92-1619

No._____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

RICHARD STEINSVAAG
and WEDDING SERVICES, INC.,

Petitioners,

v.

DIAMOND D ENTERPRISES, U.S.A., INC.,
RECEPTIONS PLUS, INC.
and DAVID J. LESSER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) What is the proper test for the separation of issues for a new trial pursuant to rule 59(a) of the Federal Rules of Civil Procedure under the Constitution's Seventh Amendment right to a civil jury trial?

(2) Whether the rules of contract interpretation bar recovery under a attorney's fees shifting provision for expenses incurred in defending counterclaims if not specifically provided for?

(3) Whether an award of attorney fees pursuant to a fee-shifting agreement which far exceed the amount recovered are reasonable and proper.

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In the Supreme Court of the United States
October Term, 1992

Richard Steinsvaag and
Wedding Services, Inc.,
Petitioners,

v.

Diamond D Enterprises, U.S.A., Inc.,
Receptions Plus, Inc. and David J. Lesser,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., 1a-13a), is reported at 979 F.2d 14-21. The judgment of the District Court (App., 77a-79a), dated September

27, 1991, is not reported. The orders of the District Court granting a new trial, dated March 8, 1991 (App., 16a-26a); awarding attorney's fees, dated April 15, 1991 (Magistrate's Report, App., 27a-72a); awarding attorney's fees for the second trial, dated September 27, 1991 (App. 73-76a); and awarding attorney's fees for the defense of the appeal (App. 80a-88a), are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 21, 1992. (App., 1a). A timely petition for rehearing was denied on November 25, 1992 (App., 14a). On February 16, 1993, Justice Thomas extended the time within which to file a petition for certiorari to and including March 16, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Seventh Amendment to the Constitution of the United States provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 59(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> New Trials; Amendment of Judgments
>
> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the

Courts of the United States;...

STATEMENT OF THE CASE

In October 1985, petitioner Wedding Services, Inc.[1] ("WSI") entered into a franchise agreement with Respondent Diamond D Enterprises, U.S.A., Inc. ("Diamond"),[2] which required, *inter*

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1. Petitioner Wedding Services, Inc. had neither subsidiaries nor a parent corporation. Respondents Receptions Plus, Inc. and Diamond D Enterprises U.S.A., Inc. were parent and subsidiary, respectively.

2. Petitioner/defendant Richard Steinsvaag had signed a guarantee of WSI's obligations under the contract.

Respondent Receptions Plus, Inc., (which has since gone out of business), was the parent company of Diamond and actually performed the obligations of Diamond under an agreement with Diamond, which had no employees or office of its own. Respondent David J. Lesser was president and major stockholder of both corporations and the individual with whom WSI and the other franchisees (all of which have failed) had most of their dealings.

alia, that WSI pay weekly royalties of five percent of gross receipts and one percent of gross receipts for advertising, while submitting weekly reports of gross receipts. Diamond D was a franchisor for a one-stop wedding service operating under the name "Receptions Plus." Within two years, WSI suffered financial difficulties and could no longer make monthly payments in October 1987. The other franchisees were also having difficulties and one went out of business.[3] At that time, Diamond suggested that WSI could forego making payments for royalties and advertising, but continue to submit its weekly statements, which WSI did. In March

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3. None of the "Receptions Plus" franchisees or any of the parent company's own outlets are now in business. All of the original three franchisees, including WSI, were out of business by March 1989.

1988, without further discussion or agreement, Diamond sent WSI a notice to cure default. Diamond terminated WSI on April 17, 1988, despite provision in the franchise agreement allowing 30 days, despite Connecticut statute requiring 60 day period to cure default after notice of such,[4] and despite the fact that WSI had paid amounts over and above the six percent required by the franchise agreement. WSI continued to use the Receptions Plus mark until September 1988. In June 1988, Diamond sued WSI and Steinsvaag for breach of the franchise agreement for failure to pay royalties and advertising fees and sought damages and an injunction restraining WSI from doing business in the wedding business

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4. Connecticut Franchise Act, Conn. Gen. Stat. §§ 42-133e - 42-133g.

and from using Receptions Plus' materials and trademark.

The Proceedings Below.[5] Diamond's motion for preliminary injunction was denied and the plaintiff did not seek a permanent injunction against trademark infringement at trial. WSI asserted counterclaims sounding in contract, tort and statutory fraud claims. In June

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5. Jurisdiction Below. Jurisdiction in the Court of Appeals for the Second Circuit was based on appellate jurisdiction over the final decision of the district court, pursuant to 28 U.S.C. § 1291. The district court is located in the Southern District of New York, which is embraced by the Second Circuit, which was the proper venue for appeal, pursuant to 28 U.S.C. § 1294. The final judgment of the district court was dated September 27, 1991.

Jurisdiction in the district court, Southern District of New York, was based on subject matter jurisdiction pursuant to 15 U.S.C. § 1121, 28 U.S.C. § 1338, and the principles of pendent jurisdiction, whereas plaintiff sought an injunction for trademark infringement under 10 U.S.C. § 1051; as well as diversity jurisdiction pursuant to 28 U.S.C. § 1332. Plaintiff was a citizen of the State of New York and defendants were citizens of the State of Connecticut. The summons and complaint were filed on June 3, 1988.

1990, the case was tried before a jury, which returned a verdict for the plaintiff of $1,300 for breach of contract. The jury did not find for the defendants on their counterclaims. The district court judge found the amount of the verdict to be inadequate and against the weight of the evidence, and granted Diamond's motion for a partial new trial limited to the issue of damages, citing Fed. R. Civ. P. 59(a). The trial on damages was heard in September 1991, and the jury returned a verdict of $17,109. The district court also awarded Diamond $40,978 for attorney's fees under a fee-shifting clause in the franchise agreement.[6]

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6. The fee-shifting clause in the franchise agreement read as follows:

In the event FRANCHISOR is required to employ legal counsel or to incur other expense to

Defendants appealed to the Second Circuit on the basis that the trial court abused its discretion in granting plaintiff's motion for a partial new trial, and in awarding plaintiff attorney's fees which were not covered by the franchise agreement and which were unreasonable and excessive.

The Second Circuit affirmed, holding that since no jury compromise was indicated, the order of a partial new

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enforce any obligation of FRANCHISEE hereunder, or to defend against any claim, demand, action or proceeding by reason of FRANCHISEE's failure to perform any obligation imposed upon FRANCHISEE by this Agreement, and provided that legal action is filed by or against FRANCHISOR and such action or the settlement thereof establishes FRANCHISEE's default hereunder, then the FRANCHISOR shall be entitled to recover from FRANCHISEE the amount of all reasonable attorney's fees of such counsel and all other expenses incurred in enforcing such obligation or in defending against such claim, demand, action, or proceeding, whether incurred prior to or in preparation for or in contemplation of the filing of such action or thereafter.

trial was within the discretion of the trial judge. The Court also held that while the fee-shifting clause was unclear,[7] (App. 7a) Diamond was entitled to attorney's fees for the defense of most of the counterclaims as well as the enforcement of the agreement, and that the total amount of the fee award was reasonable despite the fact that it was more than double the plaintiff's damages.(App. 9a-12a). The court also granted Diamond's motion for more attorney's fees incurred on appeal, and $7,500 in fees were added by the district court. (App. 80a-88a).

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7. 979 F.2d at 18-20. *See also* id.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve the question of how to properly determine whether the issues are distinct and separable as required by the Seventh Amendment for purposes of a partial new trial under Rule 59 of the Federal Rules of Civil Procedure. The District Courts and the Courts of Appeals have no consistent approach to the determination of separability of the issues, and have departed further away from the decisions of this Court in *Norfolk Southern Ry. Co. v. Ferebee*, 238 U.S. 271 (1915), and *Gasoline Products Co. v. Champlin Ref. Co.*, 283 U.S. 494 (1931). In *Norfolk Southern* and *Gasoline Products*, this Court established that, while new trials

of less than all of the issues do not necessarily violate the Seventh Amendment, they are not proper unless the issue(s) to be retried is "distinct and separable" from the others not to be retried. In the instant case, the District Court and the Court of Appeals ignored the proper standard, and held that the issues in the case were separable because there was no evidence of compromise among the jurors. This is not supported by the decisions of this Court or by common sense, fairness or logical inquiry. It significantly undermines the rights of a party to a trial by jury and fails to achieve the apparent policy goal of judicial economy. the integrity of the federal courts is implicated in the logical and consistent protection of Seventh Amendment rights.

Certiorari should also be granted with respect to the question the proper method of interpretation of an unclear contractual clause providing for the shifting of attorney's fees from one party to the other. There is also a question of what is a reasonable and proper award of attorney's fees to a party under such a clause. The court of appeals, in affirming the district court's award of attorney's fees to the plaintiff, approved an interpretation of an ambiguous clause in a contract of adhesion that was most favorable to the party who authored it, in contradiction to black letter law. *See* 4 Jaeger, Williston on Contracts § 621 at 760-61 (3d Ed. 1961). Since the clause in question involved attorney's fee-shifting, the court's holding was also in

defiance of applicable New York state common law, which requires strict interpretation against the party seeking fees under such a clause. This court has an interest in assuring the consistent application of the law by the federal courts, and should grant certicrari on these recurring issues.

I. THE COURT OF APPEALS' ANALYSIS VIOLATES THE RIGHTS OF THE PARTIES AND IS IN CONFLICT WITH THE PRECEDENTS OF THIS COURT.

The Seventh Amendment prohibits reexamination of facts tried by a jury. The Second Circuit held in this case that the trial court did not abuse its discretion in ordering a partial new trial because "there were no indicia of a jury compromise other than the low damages award." *Diamond D Enterprises U.S.A., Inc. v. Steinsvaag,* 979 F.2d 14,

18 (2d Cir. 1992)(App. 6-7a). In so holding, the court of appeals failed to apply the proper test as set out by this Court to preserve the parties' rights to a civil jury trial under the Seventh Amendment. This Court has historically defended the right to a jury trial[8] and has held that in order to separate the issues for purposes of a partial retrial, such issues must be (1) factually and logically separate, and (2) even if separate, there must be no other factors which mandate that the issues be kept together, such as a jury impropriety or a

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8. *See, e.g., Dairy Queen v. Wood,* 8 L.Ed 2d 44 (1962)(right to trial by jury must not be interfered with by court in resolving equitable claims in same case with legal ones tried by jury); *Dimick v. Schiedt,* 293 U.S. 474 (1935) (additur disallowed as an invasion of the province of the jury); *Parsons v. Bedford, Breedlove & Robeson,* 28 U.S. 433, 446 (1830) (factual determinations by a jury may only be re-examined by the granting of a new trial).

compromise verdict. *See Gasoline Products Co. v. Champlin Ref. Co.*, 283 U.S. at 500-501; 11 Wright and Miller, Federal Practice and Procedure, § 2814 at 96; *see also Westbrook v. General Tire and Rubber Co.*, 754 F.2d 1233, 1242 (5th Cir. 1985)("damages for contract breach [in *Gasoline Products*] undeterminable without knowing the terms and material dates thus interweaving liability with damages." Question of a compromise verdict relevant after separability of the factual questions is established).

The district court ordered a partial retrial on the issue of plaintiff's damages for defendant WSI's breach of the franchise agreement when the judge decided that the damages of $1300 awarded

by the jury were inadequate.[9] (App. 16a-26a). The court also excluded WSI's claims for fraud and violations of the Connecticut Unfair Trade Practices Act, ("CUTPA," Conn. Gen. Stat. Anno. §§ 42-110b - 42-110g) from the second trial. Once it has been determined that the damages awarded by the jury are

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9. After finding that damages found by the jury were inadequate and additur was inappropriate, the district court's only justification for ordering a new trial limited to the plaintiff's damages for breach of contract, was as follows: "For the forgoing reasons, the court orders a new trial on damages.fn.3: Although a surprisingly low verdict may sometimes indicate a compromise verdict, the court considers that liability was clear in this case and does not believe the low verdict resulted from compromise. Thus, it will not be necessary to retry the liability issues."(App. 26a). No justification was put forth for the court's view that liability was clear, and there was no mention of the separability of the various issues in the case. Accordingly, the court not only failed to identify the proper standard for ordering a partial new trial, but did not even attempt to an analysis of the case to justify its decision.

inadequate,[10] and that justice requires a retrial, a judge has some discretion whether to retry all of the issues or not. Fed. R. Civ. P. 59(a). Of course, this discretion must be exercised within the bounds of the Seventh Amendment. Despite factual similarity between this case and *Gasoline Products*, which also involved liability and damages for breach of contract, both the District Court and the Court of Appeals ignored this Court's directives and in a true leap of logic, held that because there were no obvious indicia of compromise by the jury, the issues were separable.(App. 5-6a).

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10. The same analysis also applies if the damages are excessive, but the damages and liability issues are more likely to be separable in the case of excessive damages than inadequate damages, since it is logical that the jury would be more certain of liability if they had awarded excessive damages than inadequate. *See Richardson v. Communication Workers of America*, 530 F.2d 126, 130 (8th Cir.), *cert. den.*, 429 U.S. 824 (1976).

In *Gasoline Products*, this Court stated that:

> [T]he question [is] whether the issue of damages is so distinct and independent of the others [arising out of the contract claim] that it can be separately tried. The verdict... may be taken to have established the existence of a contract and its breach. Nevertheless, upon a new trial, the jury cannot fix the amount of damages unless also advised of the terms of the contract; and the dates of formation and breach may be material, since it will be open to petitioner to insist upon the duty of respondent to minimize damages.... [T]he present verdict, awarding as damages on the [claim] less than the total of the items claimed by respondent, exclusive of alleged loss of profits, cannot be taken as establishing any of these material facts....Here the question of damages on the [claim] is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial. 283 U.S. at 500-501.

See 11 Wright and Miller, Federal Practice and Procedure, § 2814 at 96. The District Court justified its decision to order a new trial on damages only by

stating that it felt that "liability was clear." (App. 26a, fn.3). However, using this as a test for separability is directly in conflict to the precedents of this Court. As stated in *Gasoline Products*, the fact that liability seems clear does not make the damages a separate issue.

Here, a calculation of plaintiff's damages up to the time the contract was terminated must be made in order to determine whether there is any liability. This would be done by comparing the amounts paid by defendant to plaintiff versus the amount due to the plaintiff up to the time of termination, since the only evidence put forth by plaintiff to support its claim for breach of contract was related to the defendants' alleged non-payment of franchise fees, including

royalties and advertising fees.[11] The defendants claimed full payment, indeed, overpayment of such fees at the time of termination of the franchise agreement by the plaintiff. Thus, the question of liability and damages on the breach of contract issue are not only intertwined, they are virtually one and the same issue.[12] In essence, if there was no

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11. By the trial court's own calculations, plaintiff's damages prior to termination of WSI "would have been in the range of $5,000," based upon unpaid royalty and advertising fees. (App. 22a). While this calculation is not supported by the record and includes advertising fees for which Diamond had no legitimate claim for damages, since those amounts were meant to be spent for advertising and were not profits nor compensable damages (Diamond dropped its claim for advertising fees in its motion for additur, and made no claim for them at the second trial), it indicates that the court had no faith in the jury's verdict.

12. Defendant's defense and claim for wrongful termination under the Connecticut Franchise Act (CFA) is the flip-side of the breach of contract issue, whereas a franchise contract may not be terminated without "good cause." Conn. Gen. Stat. Anno. §42-133g.

damage up to the time the contract was terminated by the plaintiff, there was no breach (and no damages are recoverable, either for plaintiff's restitution or expectation[13] interests). The jury must also have evidence of what the contract provided with respect to payments of fees, in order to both the substantive rights of the parties and the damages. By limiting the scope of the second trial to damages on the contract only, the trial court invaded the province of the jury and prevented defendants from receiving a fair trial.

The other issues raised by the defendants' counterclaims (fraud and unfair trade practices under CUTPA) are

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13. As stated by the district court, any expectation of future profits was "speculative at best." (App. 22a).

also indistinguishably intertwined with the contract issues by the very reasoning of the courts below with regard to the award of attorney's fees under the contract. The Second Circuit affirmed the district court's award of attorney's fees, which included amounts for time spent by plaintiff's attorneys for defending the counterclaims. The justification for including the amounts related to the defense of the counterclaims was the court's opinion that: The defendant's first four

> counterclaims, the substance of which was also interposed as affirmative defenses, alleged breaches of express or implied terms of the franchise agreement. As such, they arose out of the contract and threatened its effective enforcement.... The defendants' fifth counterclaim, for fraudulent inducement, likewise would, if successful, operate to vitiate the contract..., and therefore, was also a proper basis for awarding attorney's fees.... [The CUTPA] counterclaim is indistinguishable from the fraud and

> breach-of-contract counterclaims and is based on the same common law obligations, the only difference being CUTPA's provision for recovery of punitive damages and attorney's fees.... For Diamond to have prevailed on its breach-of-contract claim, *i.e.*, to have enforced the franchise agreement, it necessarily would have had to defeat defendants' CUTPA counterclaim. (emphasis supplied, citations omitted).

The court's own reasons for including the counterclaims in the attorney's fee award are inconsistent with its reasoning that the issues in the case were separable for the purposes of a partial new trial.[14] This inner inconsistency in the opinion of the court of appeals should not be left to stand, due to the confusion likely to result from the existence of such a precedent.

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14. The petitioners do not agree with the courts below that this makes the defense of the counterclaims a proper part of the plaintiff's attorney's fee award, however. *See* pp. 39-48, *infra*.

The courts below relied on a part of the test which is irrelevant if the issues are not factually separate in the first place. Their reasoning for allowance of a partial new trial was based on the trial judge's stated belief that there was no compromise among the jurors, and as a result, the issues were separable.[15] (App. 26a). This begs the question since issues which are factually intertwined do not magically become separate just because the jurors did not compromise between them. By completely ignoring the first level of the proper test of separability as set up by this Court, the courts below violated the defendants' Seventh Amendment rights.

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15. The trial judge also stated that he felt that "liability was clear," but gave no basis for this assertion.(App. 26a). This is an invasion of the province of the jury.

BEST AV

The Second Circuit also improperly applied the abuse of discretion standard, whereas it does not apply where the district court failed to even identify the proper standard within which to exercise its discretion.

The decisions of the courts below therefore conflict with the precedents of this Court on this important question of when a partial trial violates a party's Seventh Amendment right to a jury trial in civil cases. If left in place, the court of appeals' decision is a precedent which may lead to a permanent and serious deterioration of Seventh Amendment rights.

II. THE COURTS OF APPEALS ARE IN CONFLICT IN THEIR TREATMENT OF PARTIAL NEW TRIALS IN CONTRACT CASES.

Most of the circuit courts of appeals

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except the Second and Eleventh, have consistently held that if the determination of the issues requires the same evidence, the issues are not separable and may not be tried separately. *See, e.g., Franchi Const. Co. v. Combined Ins. Co. of America,* 580 F.2d 1 (1st Cir. 1978); *Simone v. Golden Nugget Hotel and Casino,* 844 F.2d 1031, 1041 (3rd Cir. 1988)(jury needed evidence related to specific instances of false imprisonment to determine which injuries resulted from defendant's conduct); *Great Coast Exp. v. Int'l Bro. of Teamsters,* 511 F.2d 839, 846-47 (4th Cir. 1975) (two step analysis and distinction between factual separability and jury compromise);[16] *compare Colonial Leasing*

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16. "Our task here is to determine whether the district court's conclusion that the first verdict was based on honest judgment by a well-

v. Logistics Control Int'l, 770 F.2d 479, 481-482 (5th Cir. 1985)(overlapping of proof indicates interdependence of issues and requires full new trial) *with Westbrook v. General Tire and Rubber Co.*, 754 F.2d 1233, 1242 (5th Cir. 1985) (damages for contract breach undeterminable without knowing terms and material dates, thus interweaving liability with damages, but cause of action for personal injury separate from the damages sustained in the absence of juror compromise); *Thompson v. Camp*, 167 F.2d 733, 734 (6th Cir.) *cert. den.*, 335 U.S. 824 (1948)(partial new trials should be granted "only in those cases where it is plain that the error which crept into

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intentioned jury, and that the liability and damage issues were not inextricably intertwined, so that a partial new trial was fair to both parties, was an abuse of discretion..." 511 F.2d 846-47.

one element of the verdict did not in any way affect the determination of any other issue); *Chemical Sales Co., Inc. v. Diamond Chemical Corp.*, 766 F.2d 364 (8th Cir. 1985)(conversion and breach of contract were essentially same issue); *Witco Chemical Corp. v. Peachtree Doors, Inc.*, 787 F.2d 1545 (Fed. Cir. 1986) (defense's arguments against patent infringement were indistinguishably interwoven with plaintiff's proof of validity and enforceability question).

In direct conflict with the Second Circuit's decision in this case, the Eighth Circuit held in *Ryko Mfg. Co. v. Eden Services*, that although the evidence supporting the breach of contract claims was sufficient, because the measure of damages could not be separated from the substantive

determination of the underlying contractual rights, the contract verdict must be set aside and a new trial held as to both liability and damages on the contract claims. In addition, the Eighth Circuit held that the claims for antitrust and fraud must also be retried, since they depended upon some of the same evidence as the contract claim. 823 F.2d 1215, 1240 (8th Cir. 1987). The Fifth Circuit also adhered to the standard that issues which are factually intertwined must be retried together, even though the entire verdict must be set aside. In *Eximco v. Trane,* 748 F.2d 287 (5th Cir. 1984), the Fifth Circuit upheld the district court's order for a retrial of all issues rather than damages only, on the basis that the amount of profits lost by the plaintiff was closely

related to the breaches it claimed the defendant committed and the issue of damages was not separable. The issues could not be submitted independently to a jury without confusion and uncertainty, since the second jury considering damages only would be unaware of how the first jury found that the defendant had breached its contract with the plaintiff. 748 F.2d at 289. In fact, the second jury in *Eximco* found that the defendant had not breached the contract after all. 748 F.2d at 290.

In the instant case, the partial retrial limited to damages provided Diamond's president and only witness with the opportunity to make statements to the effect that there was credit given to WSI's account for excess advertising payments, shedding doubt on defendants'

liability, but defendants were unable to use this information to show lack of a breach of contract however, since that issue was foreclosed against it, and thus was denied a fair trial.

The Second and Eleventh Circuits have applied the test differently than other circuits, and have even been internally inconsistent in their application of it. In this case, a partial new trial was held not to be an abuse of discretion since there were no obvious indicia of jury compromise. In *Wheatley v. Beetar*, 637 F.2d 863 (2d Cir. 1980), the Second Circuit only inquired only into the question of compromise, despite a vigorous dissenting opinion which reminded the court of its obligations under *Gasoline Products*. However, in *Crane v. Consol. Rail Corp.*, 731 F.2d

1042 (2d. Cir.), *cert. den.*, 469 U.S. 854 (1984), the court properly identified the test under *Gasoline Products*, and contrasted the types of cases where the issues are interwoven with those where they may be tried separately. 731 F.2d at 1049.[17] In this case, the Second Circuit failed to even identify the applicable test. (App. 5a-7a). The Eleventh Circuit also confused jury compromise with factual separability in *Burger King Corp. v. Mason*, and jumped from a mention that under *Gasoline Products*, the issues be "distinct and separable" for a partial retrial, into a

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17. In *Crane*, Judge Friendly held that there was no adequate basis in the record for the trial court's order for a new trial on damages as well as contributory negligence "simply because the jury had assessed too large a degree of fault against Crane." Plaintiff's counsel, Clark, Gagliardi & Miller, had argued that a new trial which included damages was required by the Seventh Amendment.

discussion of compromise, without any analysis of whether the issues in the case were actually separable. The court then concluded that, since there was no apparent compromise, the issues were separable. 710 F.2d 1480, 1486-87 (11th Cir. 1983), *cert. denied*, 465 U.S. 1102 (1984). However, the Eleventh Circuit remanded all issues in *FIGA v. R.V.M.P. Corp.*, since they required much of the same evidence. 874 F.2d 1528, 1533-34 (11th Cir. 1989).

All of the cases relied upon by the court of appeals in this case had fact situations in which it was clear that the question of defendant's liability was not related to the amount of the plaintiff's damages.[18] Such cases are inapposite to

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18.. *See, e.g., Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439 (10th Cir. 1988) (statutory claims for wrongful termination, jury compromise

the case here, since the amount of damages in them was irrelevant to whether the defendants were liable or not. If a defendant commits a tort causing physical injury or wrongfully terminates a contract or breaches it by non-performance of a material obligation other than payment, the extent of the plaintiff's damages does not impact the

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indicated); *Spell v. McDaniel,* 824 F.2d 1380, (4th Cir. 1987), *cert. den.,* 484 U.S. 1027 (1988) (whether intentional tort occurred separable from actual extent of plaintiff's injuries); *Burger King Corp. v. Mason,* 710 F.2d 1480 (11th Cir. 1983), *cert. den.,* 465 U.S. 1102 (1984) (evidence related to (1) promissory notes, (2) wrongful termination of franchise contracts for failure to maintain standards (not for failure to pay, as in this case), and (3) damages for the breach were distinct and separable); *Mekdeci v. Merrell Nat'l Labs.,* 711 F.2d 1439 (11th Cir. 1983)(inadequate damages awarded for birth defects may have come from a compromise between liability and damages); *Hadra v. Herman Blum Consulting Eng'rs,* 632 F.2d 1242 (5th Cir. 1980), *cert. den.,* 451 U.S. 912 (1981)(whether termination was wrongful separate from damages issue); *Wheatley v. Beetar,* 637 F.2d 863 (2d Cir. 1980)(whether intentional tort occurred was separable from actual extent of plaintiff's injuries).

liability issue. The evidence needed to determine damages is not the same as that needed to determine liability and vice-versa. This is not the case here, where a calculation of plaintiff's damages up to the time the contract was terminated must be made before liability can be established. The jury would have to have much of the same evidence, and there were many facts related to the terms and breach of the contract that the new jury would have to determine in order to make an intelligent award of damages. A breach of contract for non-payment is not in the air, and cannot be found on the basis of an impression or hunch on the part of the jury.

This Court should resolve the conflict between the circuits, which has been intensified by this case. It should be

made clear that factual separability of the issues is a condition precedent to partial retrials, and that the question of juror compromise or confusion is but the second stage of the test of whether the issues are sufficiently distinct and separable so that a partial retrial may be had.

III. THE DECISION BELOW RAISES IMPORTANT AND RECURRING PROBLEMS CONCERNING THE CONSTITUTIONAL REQUISITES FOR PARTIAL NEW TRIALS PURSUANT TO RULE 59(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

This case presents the important question about what is the proper test and its application under the Seventh Amendment in determining whether the issues of a case are sufficiently separable to be retried separately. The question is important because it implicates the Constitutional right to a

jury trial. The question recurs in almost every case where some aspect of a trial causes either the trial judge or an appellate court to order a retrial of some or all of the issues. This Court has not addressed this issue since *Gasoline Products Co. v. Champlin Ref. Co.*, 283 U.S. 494 (1931).

As discussed herein, the decisions of the courts below present the question of whether the proper test for separation of the issues in a partial retrial requires factual separability or simply that there be no apparent compromise in the verdict. The consistent application of one clear test for permitting partial retrials under the Seventh Amendment is necessary to preserve the integrity of the jury as

the fact finder.[19] A decision by this Court is needed to supply guidance to the federal courts on the proper test to be applied.

IV. THE LOWER COURTS' AWARD OF ATTORNEYS' FEES INCLUDES PORTIONS NOT PROVIDED FOR IN THE AGREEMENT BETWEEN THE PARTIES, PRESENTING AN IMPORTANT ISSUE OF CONTRACT INTERPRETATION THAT OUGHT TO BE RESOLVED BY THIS COURT.

The Second Circuit's holding, affirming the district court's award of $40,978 in attorney's fees (and leading to $7500 in additional fees on appeal), is contrary to well-established rules of contract

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19. An order for a new trial on the ground that the verdict was against the weight of the evidence substitutes the judgment of the trial judge as to the facts and credibility of the witnesses for that of the jury. "Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts." *Lind v. Schenley Industries*, 278 F.2d 79, 90 (3rd Cir.)(en banc), *cert. denied*, 364 U.S. 835 (1960).

interpretation and applicable New York State law. The fee-shifting clause in the franchise agreement[20] was found to be unclear (App. 7a), but the court failed or refused to interpret it against the plaintiff, who authored the agreement, and awarded the plaintiff attorney's fees for the defense of the counterclaims.

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20. The fee-shifting clause in the franchise agreement read as follows:

In the event FRANCHISOR is required to employ legal counsel or to incur other expense to enforce any obligation of FRANCHISEE hereunder, or to defend against any claim, demand, action or proceeding by reason of FRANCHISEE's failure to perform any obligation imposed upon FRANCHISEE by this Agreement, and provided that legal action is filed by or against FRANCHISOR and such action or the settlement thereof establishes FRANCHISEE's default hereunder, then the FRANCHISOR shall be entitled to recover from FRANCHISEE the amount of all reasonable attorney's fees of such counsel and all other expenses incurred in enforcing such obligation or in defending against such claim, demand, action, or proceeding, whether incurred prior to or in preparation for or in contemplation of the filing of such action or thereafter.

In choosing among the reasonable meanings of an agreement or a term thereof, that meaning which operates against the party who supplies the words or from whom the writing proceeds is generally preferred. Restatement (Second) of Contracts § 206. This is especially true where the contract is one of adhesion, as here. (App. 76a). *See Turski v. Chiesa,* 89 Misc.2d 443, 391 N.Y.S.2d 803 (N.Y. Sup. Ct 1977).

In addition, New York law applies to the contract by agreement, and contractual clauses for shifting attorney's fees are not favored and strictly construed against the party seeking fees. *Zauderer v. Barcellona,* 130 Misc.2d 234, 495 N.Y.S.2d 881 (N.Y. City Civ. Ct. 1985). Instead of following these basic rules, the Second Circuit

took a loose interpretation of the clause, in the light most favorable to the promisee/author of the agreement. In so doing, the court of appeals has set a precedent for favoring parties who author ambiguous clauses and for ignoring applicable state law.

The general "American Rule" is that each party must bear the cost of its own legal representation. Here, the court ensures that plaintiff was compensated for attorney's fees incurred in defending the defendants' counterclaims, yet the only fees and expenses related to "defense" mentioned in the fee-shifting clause is against vicarious liability.[21] There is no reference to claims by reason

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21. "...to defend against any claim, demand, action or proceeding by reason of FRANCHISEE's failure to perform any obligation imposed upon FRANCHISEE by this Agreement ..."

of the *franchisor's* failure to perform any obligation under the agreement or of the law, irrespective of the outcome of such an action. In an adhesion contract such as this one (App. 76a), the plaintiff, who drafted the agreement could easily have chosen wording which would clearly indicate that franchisee would have to pay for the franchisor's defense of any claims or counterclaims by the franchisee against the franchisor which are resolved in the franchisor's favor. Opting not to word it in this way indicates the intentions of the draftsman, and the wording of an adhesion contract is to be construed against the draftsman. *See Rentways v. O'Neill Milk & Cream Co.*, 308 N.Y. 342, 344, 126 N.E.2d 271, 273 (N.Y. 1955); *A & Z Appliances, Inc., v. Electric Burglar*

Alarm Co., 90 A.D.2d 802, 803, 455 N.Y.S.2d 674, 675 (N.Y. App. Div. 1982).

The district court mischaracterized the nature of WSI's counterclaims, and awarded attorney's fees for most of them, including count two, which was for misappropriation of funds. This count does not involve fraudulent inducement to enter into the contract, which would vitiate the contract. Nor is it *ex contractu*, even by the standard put forth by the court, since it is a tort, not a breach of contract claim. Nonetheless, the magistrate found that it was, using the reasoning that a misappropriation of funds would not occur without the existence of the contract! This makes no sense, since the existence of the contract was a fortuitous circumstance that would assist in misappropriating

funds, a tort entirely separate from the function or validity of the contract itself. Count three was for tortious interference with business opportunities, another tort which would not directly affect the enforcement of the agreement.

The remaining counterclaims for which the District Court awarded attorney's fees to the plaintiff were for breach of contract for failure to provide services under the franchise agreement; breach of contract for entering into territorial agreements which conflicted with WSI's rights under the agreement; misrepresentation of the amount necessary as an initial investment in the franchise; and violations of the Connecticut Unfair Trade Practices Act (CUTPA), due to misrepresentations and failure to provide services and support

under the agreement. The attorney's fees related to the defense of these counterclaims are not compensable under this particular fee provision, since the provision does not mention claims by the franchisee and they are distinct from the plaintiff's claims. In fact, the policy behind the CUTPA statute is to encourage claims, a purpose which would be thwarted if CUTPA claimants who happened to be parties to contracts that contained fee-shifting provisions had to worry about having to pay the other party's attorney's fees.

By the Second Circuit's thinking, the mere existence of a "contractual attorney's fee provision" entitles a fee applicant to recover on counterclaims related to the contract regardless of the wording of the fee provision (App. 7a-

8a). This reasoning subverts the rules of contract interpretation and New York common law which insist on determining the meaning of the clause in question. In addition, the court saw no problem with awarding the full amount of fees as determined by the district court to the plaintiff although there were two other co-defendants to the counterclaims, Receptions Plus, Inc. and David J. Lesser. Nowhere in the agreement's attorney's fee provision does it mention that the franchisee will also be liable to the franchisor for attorney's fees incurred by other independent parties. The court may have felt that the other parties were related to Diamond, but nowhere was it alleged by Diamond that all three parties were one and the same. What if the parties were more blatantly

unrelated? All parties must pay for their own legal representation.

Wherefore, the Second Circuit's holding that attorney's fees related to the defense of the counterclaims should not be left to stand as a precedent for the future interpretation of attorney's fee-shifting clauses, and for the interpretation of contracts in general.

V. THE SECOND CIRCUIT APPROVED AN AWARD OF ATTORNEY'S FEES WHICH FAR EXCEEDED THE AMOUNT OF THE VERDICT, PRESENTING AN IMPORTANT QUESTION OF WHAT THE STANDARD FOR REASONABLE ATTORNEY'S FEE AWARDS UNDER A CONTRACTUAL PROVISION, WHICH SHOULD BE RESOLVED BY THIS COURT.

The total amount of attorney's fees awarded to the plaintiff to date is $48,478.[22] The total amount of the

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22. $34,288 up through the first trial (App. 68a), $6,690 through the second trial (App. 76a), and $7,500 through the appeal to the Second Circuit (App. 87a).

plaintiff's damages verdict was $17,109.

New York law applies to the agreement, pursuant to a choice of law clause. (Mag. Rep., App. 35a). In New York, an award of attorney's fees under a fee-shifting agreement must be reasonable in hourly rate and in total amount. In the federal courts, reasonableness of such fees is always an issue. *See, e.g., Lewis v. Coughlin,* 801 F.2d 570, 577 (2d Cir. 1986). New York courts will rarely award attorney's fees in excess of the amount recovered, and consider the amount which a reasonable plaintiff would arrange to pay in the absence of a fee-shifting agreement. *See Equitable Lumber Corp. v. IPA Land Develop. Corp.,* 38 N.Y.2d 516, 524, 344 N.E.2d 391, 397, 381 N.Y.S.2d 459, 465 (N.Y. 1976). This is a reasonable and just standard.

The Second Circuit justified the amount of the award of attorney's fees because plaintiff sought approximately $90,000 in damages. However, this amount included highly speculative future damages (App. 25a) based on the potential receipts of WSI, which had gone out of business because of a lack of income and which had been part of a franchise system which also no longer existed. By plaintiff's own version of events (disputed by defendants, *see discussion*, pp. 21-22, *supra*), defendant WSI was past due by only $2,800 at the time of termination. The plaintiff admitted at the second trial that the original Receptions Plus store's business was declining and that the stores opened by the parent company had failed. The amounts claimed also did not take into account plaintiff's duty to

mitigate damages, an essential component of any calculation of damages. Thus the total amount of the plaintiff's claim was not a good faith expectation. The reliance by the courts below on that amount of $90,000 to justify the reasonableness of the fee award is erroneous and sets an inappropriate precedent.

An additional justification by the court for the amount of the award was that plaintiff had to defend several counterclaims which, according to the courts below, were primarily for purposes of defending against the breach of contract claim. However, the high amount of the fees cannot be justified in this way, since the counterclaims were not *ex contractu* (*see* discussion, pp. 40a-48a, *supra*) and even if they were, it is

foreseeable that a defendant will defend against a claim, thus costs related to disproving defenses should be taken into account by the plaintiff in the first place. It is not reasonable for a plaintiff to agree to spend more on attorney's fees than it will recover in the suit itself. The potential risks of litigation must be considered as well as the potential benefits when considering the reasonableness of plaintiff's alleged agreement with its attorneys.[23]

The integrity of the federal courts is

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23. The plaintiff never submitted evidence of its retainer agreement with its attorneys, nor copies of actual bills for its attorneys' services to the district court.

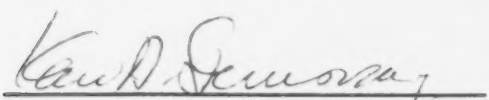
The district court made no attempt to examine the reasonableness of plaintiff's attorneys' hourly rate, and its failure to do so was an abuse of discretion. *See LaFarge Conseils et Etudes, S.A. v. Kaiser Cement,* 791 F.2d 1334, 1342 (9th Cir. 1986). Nor did the court consider the duplication of efforts by the two attorneys who worked consecutively on plaintiff's case.

an issue where the amount of attorney's fees awarded to a party are in excess of the amount involved in the case. This Court should delineate a clear standard for determining a reasonable amount.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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March 15, 1993.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1860—August Term, 1991

(Argued: August 10, 1992 Decided: October 21, 1992)

Docket No. 91-9196

DIAMOND D ENTERPRISES USA, INC.,

Plaintiff-Counter-Claim-Defendant-Appellee,

—v.—

RICHARD STEINSVAAG; WEDDING SERVICES, INC.,

Defendants-Counter-Claim-Plaintiffs-Appellants,

RECEPTION PLUS, INC.; DAVID J. LESSER,

Counterclaim-Defendants.

Before:

WINTER, MINER and MCLAUGHLIN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Charles L. Brieant, *Chief Judge*, awarding franchisor damages and attorney's fees for franchisee's breach of franchise agreement.

AFFIRMED.

KARI A. STEINSVAAG, Redding, CT, *for Appellants.*

NICHOLAS J. DAMADEO, Hicksville, NY (Steven Bret Drelich, Fran G. Hirmes, Nicholas J. Damadeo, P.C., Hicksville, NY, of counsel), *for Appellee.*

MCLAUGHLIN, *Circuit Judge*:

Diamond D Enterprises USA, Inc., a franchisor of wedding-service businesses, entered into a franchise agreement with Wedding Services, Inc. ("WSI"), a corporation owned by Richard Steinsvaag, who personally guaranteed WSI's obligations. After WSI stopped making royalty payments, Diamond sued WSI and Steinsvaag for breach of contract in the United States District Court for the Southern District of New York. WSI and Steinsvaag asserted counterclaims against Diamond, its president, David Lesser, and an affiliate, Reception Plus, Inc.

The case was tried before Senior District Judge Lee P. Gagliardi and a jury, which returned a $1,300 verdict for Diamond on its breach of contract claim and rejected defendants' counterclaims. Finding the $1,300 verdict inadequate,

Judge Gagliardi granted Diamond's motion under Fed. R. Civ. P. 59(a) for a new trial on damages only. The damages trial was then heard by Chief Judge Charles L. Brieant and a jury, which awarded Diamond $17,109. The district court also awarded Diamond a total of $40,978 for attorney's fees pursuant to a fee-shifting clause in the franchise agreement. On appeal, WSI and Steinsvaag argue principally that the district court erred by (1) ordering a new trial limited to damages only, and (2) awarding excessive attorney's fees. We now affirm.

BACKGROUND

Diamond is the franchisor of a one-stop wedding service, operating under the name "Receptions Plus". As anyone who has ever given a wedding reception will attest, there is a distinct market for this service. Franchisees of Receptions Plus will arrange the entire reception, coordinating catering, photography, limousines, floral arrangements and all the other "necessities" of a modern wedding. Diamond's President, David Lesser, had operated his own company called Reception Plus, Inc. for several years before deciding to franchise the wedding-service business through Diamond.

In October 1985, Diamond entered into a franchise agreement with WSI, a corporation owned by Steinsvaag, who personally guaranteed WSI's obligations under the contract. The franchise agreement required WSI to pay Diamond royalties of five percent of gross receipts and to contribute another one percent to a system-wide advertising fund. These payments were due weekly, along with a written statement of gross receipts for the week.

In March 1986, WSI opened its Receptions Plus franchise in Bridgeport, Connecticut, and quickly ran into financial difficulty. By October 1987, WSI could no longer make its

weekly payments, although it continued to submit the weekly statements to Diamond. In March 1988, Diamond sent WSI a notice to cure default under the franchise agreement. WSI did not respond. Diamond then terminated WSI's franchise, effective April 17, 1988. Despite the termination, WSI continued to use the Receptions Plus mark, and continued to hold itself out as a Receptions Plus franchise, until September 1988. In June 1988, Diamond sued WSI and Steinsvaag for breach of the franchise agreement, seeking damages and an injunction restraining the defendants from using Receptions Plus's materials or mark.

The defendants asserted three affirmative defenses and eight counterclaims, naming Lesser and his original company, Reception Plus, Inc., as additional counterclaim defendants. Although the counterclaims alleged various contract, tort, and statutory claims, they shared a common nucleus: that Diamond fraudulently induced WSI to execute the franchise agreement by misrepresenting the prospects of franchises in the Receptions Plus system.

The defendants later moved to amend their answer to add four more counterclaims alleging violations of the federal antitrust statutes. The district court denied the motion to amend and this ruling is not challenged on appeal. Also not at issue on appeal is the district court's pretrial dismissal of all but two of the counterclaims: one for fraudulent misrepresentation and one for violations of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110a *et seq*.

The case was tried for two days before Judge Gagliardi and a jury, which then returned a verdict of $1,300 for Diamond on its breach of contract claim, and rejected defendants' surviving counterclaims. Alleging that the jury's award of damages was inadequate, Diamond moved for conditional additur or for a new trial on damages only. Judge Gagliardi

granted the motion for a new trial on damages only, holding that "a reasonable jury applying the court's instructions could [not] find damages in such a low amount. . . . Even when future damages are not taken into account, it is clear that the amount of plaintiff's actual damage considerably exceeded the $1300 awarded."

Diamond also moved for an interim award of $48,795 in attorney's fees pursuant to a fee-shifting clause in the franchise agreement. Judge Gagliardi referred the fee motion to Magistrate Judge Joel J. Tyler, who issued a Report and Recommendation ("R&R") setting the fee award at $34,288, which Judge Gagliardi adopted without modification.

The damages trial was eventually conducted before Chief Judge Brieant and a jury, which awarded Diamond damages of $17,109. To this Chief Judge Brieant added $6,690 for attorney's fees incurred since the first fee award.

On appeal, the defendants principally argue that the district court's grant of only a partial new trial was an abuse of discretion and that the award of attorney's fees was both unauthorized and excessive.

DISCUSSION

I. Partial New Trial

Steinsvaag argues that Judge Gagliardi erred by not ordering a total new trial, to include both liability and damages. Fed. R. Civ. P. 59(a), however, authorizes a district court to grant a new trial "on all *or part of the issues*," *id.* (emphasis added), and we will disturb a ruling on a Rule 59 motion only if we find an abuse of discretion. *See Wheatley v. Beetar*, 637 F.2d 863, 865 (2d Cir. 1980).

The "most common example" of a partial new trial is "a new trial limited to damages when liability has been properly determined . . . . " 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2814, at 93 (1973). "[A] new trial on damages only is not proper if there is reason to think that the verdict may represent a compromise among jurors with different views on whether defendant was liable or if for some other reason it appears that the error on the damage issue may have affected the determination of liability." *Id.* § 2814, at 29 (Supp. 1992); *see also Spell v. McDaniel*, 824 F.2d 1380, 1400 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988).

An inadequate damages award, standing alone, does not indicate a compromise among jurors. *See, e.g., Hadra v. Herman Blum Consulting Eng'rs*, 632 F.2d 1242, 1245-46 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981). Besides inadequate damages, there must be other indicia of compromise, such as difficulty in jury deliberations or close questions of liability. *Compare Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1445-46 (10th Cir. 1988) (jury compromise indicated by inadequate damages, close questions of liability and difficult deliberations) *and Mekdeci v. Merrell Nat'l Labs.*, 711 F.2d 1510, 1514-15 (11th Cir. 1983) (same) *with Phav v. Trueblood, Inc.*, 915 F.2d 764, 768-69 (1st Cir. 1990) (affirming grant of partial new trial where only indication of juror compromise was inadequate damages award) *and Burger King Corp. v. Mason*, 710 F.2d 1480, 1487-88 (11th Cir. 1983) (same), *cert. denied*, 465 U.S. 1102 (1984).

In this case, as in the *Phav* and *Burger King* cases, *supra*, there were no indicia of a jury compromise other than the low damages award. The jury deliberated only one day, without incident, and the issue of the defendants' liability for breach of contract was reasonably clear. Accordingly, Judge

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Gagliardi's grant of a partial new trial was well within his discretion.

II. Attorney's Fees

A. *Fee Award for Defending Counterclaims*

The franchise agreement, which both parties agree is governed by New York law, contained a fee-shifting clause that is hardly a paragon of clarity:

> In the event FRANCHISOR is required to employ legal counsel or to incur other expense to enforce any obligation of FRANCHISEE hereunder, or to defend against any claim, demand, action, or proceeding by reason of FRANCHISEE's failure to perform any obligation imposed upon FRANCHISEE by this Agreement, and provided that legal action is filed by or against FRANCHISOR and such action or the settlement thereof establishes FRANCHISEE's default hereunder, then FRANCHISOR shall be entitled to recover from FRANCHISEE the amount of all reasonable attorney's fees of such counsel and all other expenses incurred in enforcing such obligation or in defending against such claim, demand, action, or proceeding, whether incurred prior to or in preparation for or contemplation of the filing of such action or thereafter.

Steinsvaag reads this ambling one-sentence clause to provide for reimbursement only of those attorney's fees "incurred in enforcing" the franchise agreement. It would, therefore, exclude an award of fees for defending counterclaims.

We agree with the district court, however, that the nature—not the nomenclature—of a claim is controlling. Thus, "where a fee applicant recovers on a claim subject to a contractual attorney's fee provision and in the process litigates a

counterclaim on which he must prevail in order to recover on his claim, then the fee applicant is entitled to his attorney's fees for both the claim and the counterclaim." *Singer v. Shannon & Luchs Co.*, 670 F. Supp. 1024, 1028 (D.D.C. 1987); *see also Towers Charter & Marine Corp. v. Cadillac Ins. Co.*, 894 F.2d 516, 525 (2d Cir. 1990) (affirming contractual award of attorney's fees to party "required to defend each action in order to establish its right to recover"); *cf. Burger King*, 710 F.2d at 1496-97 (affirming award of fees incurred developing overlapping issues relevant to both compensable and non-compensable matters). Because Diamond has not cross-appealed the district court's refusal to award fees incurred defending certain counterclaims, we review only the six counterclaims the defense of which served as a basis for the fee award. Of course, the fact that only two of these six counterclaims went to trial affects the amount of the fee award, not whether their defense was compensable.

The defendants' first four counterclaims, the substance of which was also interposed as affirmative defenses, alleged breaches of express or implied terms of the franchise agreement. As such, they arose out of the contract and threatened its effective enforcement. Thus, the franchise agreement permitted an award for fees incurred defending these counterclaims.

The defendants' fifth counterclaim, for fraudulent inducement, likewise would, if successful, operate to vitiate the contract, *see Citibank, N. A. v. Plapinger*, 66 N.Y.2d 90, 94, 495 N.Y.S.2d 309, 311 (1985); *Hematian v. Yoo*, 148 A.D.2d 675, 677, 539 N.Y.S.2d 424, 426 (2d Dept. 1989), and, therefore, was also a proper basis for awarding attorney's fees. *See LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1340 n.16 (9th Cir. 1986) ("An action to avoid, reform or rescind a contract due to intentional misrepresentations is an action on a contract.").

The only other counterclaim which served as the basis for an award of fees was defendants' CUTPA counterclaim, accusing Diamond and its affiliates of "misrepresenting or omitting material facts concerning the proposed franchise relationship and failing to provide the services and support which was required by the franchise agreement, [and] engag[ing] in deceptive and misleading acts which violated the [CUTPA]." This claim is indistinguishable from the fraud and breach-of-contract counterclaims and is based on the same common law obligations, the only difference being CUTPA's provision for recovery of punitive damages and attorney's fees. *Cf.* Peter L. Costas, *Unfair Competition and Unfair Trade Practices—Transplants to the Unfair Trade Practices Act*, 54 Conn. B.J. 405, 405 (1980) ("injured party may bring violations of . . . recognized torts under the comprehensive proscriptions of CUTPA and thus obtain its procedural and substantive benefits"). For Diamond to have prevailed on its breach-of-contract claim, *i.e.*, to have enforced the franchise agreement, it necessarily would have had to defeat defendants' CUTPA counterclaim. *See, e.g., Bailey Employment Sys., Inc. v. Hahn*, 545 F. Supp. 62, 73 (D. Conn. 1982) (successful CUTPA counterclaim vitiates franchise agreement), *aff'd*, 723 F.2d 895 (2d Cir. 1983). Accordingly, the award of fees incurred defending the CUTPA counterclaim was proper.[1]

B. *Reasonableness of Fee Award*

Because a fee-shifting clause can produce perverse incentives for a litigant (and his attorneys), *see Peter Fabrics, Inc. v. S.S. "Hermes"*, 765 F.2d 306, 317 (2d Cir. 1985) (Friendly,

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[1] We do not suggest that successful defense of CUTPA counterclaims will always entitle a prevailing party to attorney's fees under a contractual fee-shifting clause. Each case must be determined on its facts and under the language of the agreement at issue.

J.), courts must scrutinize fee requests to ascertain whether they are reasonable. As we stated in *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250 (2d Cir. 1987), the rule in New York is that "when a contract provides that in the event of litigation the losing party will pay the attorneys' fees of the prevailing party, the court will order the losing party to pay whatever amounts have been expended by the prevailing party, so long as those amounts are not unreasonable." *Id.* at 1263.

The defendants agree that reasonableness is the touchstone for fixing an award of fees pursuant to contract, but argue that *Krear* damns, as unreasonable, an award of fees in excess of the amount actually *recovered* in a lawsuit. We do not read *Krear* so categorically.

The rule in New York is that an award of fees "in excess of the amount *involved* in a litigation would normally appear to be unreasonable." *Colon v. Automatic Retailers Ass'n Serv., Inc.*, 74 Misc. 2d 478, 486, 343 N.Y.S.2d 874, 883 (N.Y.C. Civ. Ct. 1972) (quoted in *Krear*, 810 F.2d at 1264) (emphasis added), *rev'd on other grounds*, 74 Misc. 2d 665, 347 N.Y.S.2d 312 (App. Term 1st Dept. 1973); *accord Simmons v. Government Employees Ins. Co.*, 59 A.D.2d 468, 472, 400 N.Y.S.2d 99, 101 (2d Dept. 1977) ("it is the exception rather than the rule to make an award of attorney's fees which exceeds the amount of the *underlying claim*") (emphasis added); *Peter Fabrics*, 765 F.2d at 319-20 & n.7 (referring to "the amount at stake", "[t]he amount in controversy" and "the amount of [a litigant's] exposure" in assessing fee award to indemnitee).

Krear is not to the contrary. Indeed, we repeated in *Krear* the "general rule" that "New York courts . . . will rarely find reasonable an award to a plaintiff that exceeds the amount *involved* in the litigation." 810 F.2d at 1264 (emphasis added) (citing *Colon*, 74 Misc. 2d at 486); *see also National Union*

Fire Ins. Co. v. Hartel, 782 F. Supp. 22, 24 (S.D.N.Y.) (applying *Krear*; looking to amount at issue in litigation when setting fee award), *aff'd*, 972 F.2d 1328 (1992). Under *Krear*, therefore, the amount reasonably in controversy in a litigation, not the amount actually recovered, is generally the ceiling on the fees that may be awarded pursuant to a fee-shifting clause.

This is only a rule of thumb, however. It is a starting point in the process of ultimately determining whether a fee award is reasonable. As we observed in *Krear*, another index of reasonableness is whether the fee arrangement is "grossly disproportionate to the arrangement the plaintiff would have been expected to make with counsel in the absence of a fee-shifting agreement." *Krear*, 810 F.2d at 1263 (citing *Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 N.Y.2d 516, 524, 381 N.Y.S.2d 459, 465 (1976)). In *Krear*, we held it unreasonable to foist upon the defendant his adversary's attorneys' fees calculated by hourly billing "in light of the one-third contingent fee arrangement this plaintiff in fact made with [its attorneys] for other litigation involving the Contracts at issue here . . . . " *Id.* at 1264. This conclusion was a straightforward application of the rule that a party getting an award of counsel fees may not " 'manipulate the actual damage incurred by burdening [his adversary] with an exorbitant fee arrangement.' " *Id.* at 1263 (quoting *Equitable Lumber*, 38 N.Y.2d at 524, 381 N.Y.S.2d at 465).

When, as in *Krear*, a contingent fee arrangement is implicated, the amount actually recovered in a litigation assumes a peculiar significance—not present in this case—in determining the reasonableness of a fee award. In non-contingent fee cases, the amount recovered is just one of many criteria the district court considers in setting attorney's fees. *See generally Colon*, 74 Misc. 2d at 486-87, 343 N.Y.S.2d at 882-83; *Baron Data Sys., Inc. v. Loter*, 377 S.E.2d 296 (S.C. 1989).

In this case, the amount reasonably at issue was significantly greater than the sum recovered, and the award of attorney's fees reflected this fact. First, Diamond was seeking damages upwards of $100,000 on its breach of contract claim. Second, Diamond was forced to defend counterclaims seeking several hundred thousand dollars (as well as punitive damages and attorney's fees) in order to prevail on its claim and enforce the franchise agreement. *See, e.g., Krear*, 810 F.2d at 1264 (awarding attorney's fees to the extent of party's reasonable exposure on counterclaims); *Peter Fabrics*, 765 F.2d at 320 (fees awarded to indemnitee must be reasonably related to its exposure on claims against it). Finally, Diamond's attorneys had to prepare and prosecute two trials. In light of these facts, it can hardly be said that a fee award of approximately $41,000 was unreasonable, particularly since the defendants themselves apparently spent even more on this litigation. *See Blackburn v. Goettel-Blanton*, 898 F.2d 95, 97 (9th Cir. 1990) (holding that contractual fee award of almost ten times damages was reasonable under the circumstances).

Defendants call our attention to cases holding that fee awards of fifteen to thirty percent of the amount recovered are not automatically held reasonable, *see, e.g., First Nat'l Bank of E. Islip v. Brower*, 42 N.Y.2d 471, 398 N.Y.S.2d 875 (1977); *Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 N.Y.2d 516, 381 N.Y.S.2d 459 (1976); *Mead v. First Trust & Deposit Co.*, 60 A.D.2d 71, 400 N.Y.S.2d 936 (4th Dept. 1977); *National Bank of Westchester v. Pisani*, 58 A.D.2d 597, 395 N.Y.S.2d 487 (2d Dept. 1977). From this they argue that awards in excess of the amount recovered *must* be infirm. Apart from the obvious fallacy in the argument, the cases on which defendants rely are inapposite because each involved a fee-shifting provision that set attorney's fees as a percentage of a debt or damages. In rejecting "mechanical application[s]" of liquidated fee awards, these cases reaffirm the rule that

only reasonable fees are compensable. *Brower*, 42 N.Y.2d at 472, 474-75, 398 N.Y.S.2d at 876, 877.

CONCLUSION

In sum, we hold that the district court did not abuse its discretion in ordering a partial new trial or in fixing attorney's fees. We have considered appellants' other arguments and find them to be without merit. Accordingly, the judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of November one thousand nine hundred and ninety-two.

Present: Hon. RALPH K. WINTER,
Hon. ROGER J. MINER,
Hon. JOSEPH M. McLAUGHLIN,
CIRCUIT JUDGES,

DIAMOND D ENTERPRISES U.S.A., INC.,
Plaintiff-Counter-Claim-Defendant-Appellee

v Docket No. 91-9196

RICHARD STEINSVAAG AND WEDDING SERVICES, INC.,
Defendant-Counter-Claim-Plaintiff-Appellants,

RECEPTIONS PLUS, INC.; DAVID J. LESSER,
Counter-Claim-Defendants.

A petition for rehearing having been

filed herein by appellant Richard Steinsvaag and Wedding Services, Inc.

Upon consideration by the panel thereof, it is

Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith,
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DIAMOND D ENTERPRISES U.S.A., INC.,

Plaintiff,

-against-

RICHARD STEINSVAAG and WEDDING SERVICES, INC.,

Defendants and Counterclaim Plaintiffs,

-against-

DIAMOND D ENTERPRISES U.S.A., INC., et al.,

Counterclaim Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR A PARTIAL NEW TRIAL ON DAMAGES AND DENYING PLAINTIFF'S MOTION FOR ADDITUR

Pursuant to Federal Rules of Civil Procedure 50(b), 59(a), and 59(e), plaintiff moves this court for conditional additur or for a new trial on damages. As grounds for its motion, plaintiff alleges that the damages are

inadequate and that the verdict may have been tainted by juror confusion or by sympathy for the defendants.

I. Facts

In October 1985, Richard Steinsvaag contracted with the plaintiff, Diamond D Enterprises, to open a wedding services franchise. This action arose after Steinsvaag and the franchisee, Wedding Services, Inc., stopped paying plaintiff royalty and advertising fees required by the franchise agreement. The agreement provided for monthly payments of such fees, calculated, respectively, as five percent and one percent of gross sales. The defendants stopped making payments in October 1987, and plaintiff responded in April 1988 by terminating the contract. Under its original terms, the franchise relationship would have continued until

October 1995. Despite the termination, defendants continued to use plaintiff's name and service mark, in advertisements and at the store, at least until September 1988. In March 1989, the defendants' business closed.

The plaintiff brought this suit seeking past and future lost royalty and advertising fees. In response, the defendants raised a number of counterclaims, including fraud and unfair trade practices. The case was tried before a jury at the end of May and the beginning of June 1990. At trial, plaintiff produced only one witness, its majority owner and president, David Lesser. Lesser calculated plaintiff's damages for the period after the April 1988 contract termination at approximately $130,000. This figure

included $108,000 in lost royalties and $21,400 in lost advertising fees. Lesser's calculations assumed a five percent annual growth in defendant's business, continuing until the scheduled end of the contract in October 1995. Lesser did not testify about the amount of money defendants owed plaintiff at the time the contract was terminated. Although defendants contested whether any fees were in arrears at that time, Mr. Steinsvaag testified to gross receipts of $236,000 in 1987 and $250,000 in 1988. After hearing the evidence, the jury found damages for the plaintiff in the amount of $1300. It found against the defendants on all counterclaims that had not already been dismissed.

II. Juror Confusion or Bias.

As its first level of attack against

the verdict, plaintiff argues that the jury was confused in its calculation of damages and improperly moved by sympathy for Mr. and Mrs. Steinsvaag. To support this claim, plaintiff's counsel has filed an affidavit detailing his post-verdict interviews with one alternate and four deliberating jurors. Counsel attacks the method used to calculate damages as revealed by these conversations, claiming it was illogical and contrary to the court's instruction.[1]

The law is well settled that evidence

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1. The court instructed the jury as follows:

> If your verdict is for the plaintiff you will award the plaintiff the amount of money proved by a preponderance of the credible evidence to be the amount defendants failed to pay according to the terms of the contract as well as future damages reflecting the amount of money defendants would have paid plaintiff if defendants had fulfilled their obligations under the contract.

of jurors' post-verdict statements cannot be used to attack their verdict absent a claim of outside influence on the deliberations. McDonald v. Pless, 238 U.S. 264 (1915); Woods v. Bank of New York, 806 F.2d 368, 373 (2d Cir. 1986); see also Fed. R. Evid. 606(b). As the law is clear, so are the policies underlying it sound. The court declines to consider incompetent, hearsay evidence of events occurring behind closed juryroom doors.

III. Inadequate Damages

A trial court may amend a jury verdict or set it aside and order a new trial when the verdict is seriously erroneous or is against the weight of the evidence so that to allow it to stand would be a miscarriage of justice. Bevevino v. Saydjari, 574 F.2d 676, 684 (2d Cir.

1978).

In this case, the court cannot accept that a reasonable jury applying the court's instructions could find damages in such a low amount. Although the plaintiff's only damages evidence came from an interested witness, the witness's estimates of the franchise's gross receipts were supported in large measure by defendant Steinsvaag's own testimony. For example, Steinsvaag admitted to $250,000 gross receipts for 1988. In that year, defendants continued as plaintiff's franchisees into April without making any contractual fee payments. Royalty and advertising fees for these months, had they been paid, would have been in the range of $5,000, almost four times the verdict amount. This calculation does not consider unpaid

fees for the last three months of 1987 or future damages. Although Lesser's projections of future receipts were speculative at best, the court accepts that future royalties might have been substantial had the contractual relationship continued until 1995 as originally anticipated. Even when future damages are not taken into account, it is clear that the amount of plaintiff's actual damage considerably exceeded the $1300 awarded. For these reasons, the court holds the verdict to be seriously erroneous and against the weight of the evidence.

IV. Conditional Additur

The plaintiff urges the court to order conditional additur rather than a new trial on damages. In Dimick v. Schiedt, the Supreme Court held that to order

additur without a plaintiff's consent would deprive plaintiff of the right to trial by jury. 293 U.S. 474, 486-87 (1935). Generally, federal courts have interpreted this stricture to bar additur altogether, although some federal courts have performed additur in limited circumstances. The plaintiff points to cases where the court has approved the practice in a particular case because the nature of the damages in that case made them a matter of law for the judge and not a question of fact for the jury. Jones v. Wal-Mart Stores, Inc., 870 F.2d 982, 985 (5th Cir. 1989)(damages agreed upon by stipulation and therefore not in dispute); Davis v. United States, 716 F.2d 418, 430 (7th Cir. 1983)(bench trial). Those cases are not this case. The damages evidence proffered in this

case were contested and speculative. It was offered by an interested witness and involved projecting estimated revenues ten years into the future. Approximating future receipts and evaluating witness credibility are factual issues squarely within the jury's province.

Additionally, plaintiff argues, additur should be available in diversity cases as a matter of substantive case law.[2] McCoy v. Wean United, Inc., 67 F.R.D. 495 (E.D. Tenn. 1975). The Second Circuit has not addressed this precise question but has shown a tendency to interpret narrowly the proscription of Dimick v. Scheidt. See Earl v. Bouchard Transp. Co., 917 F.2d 1320, 1331 (2d Cir.

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2. The procedure of conditional additur is available to New York state courts. See, e.g., Walters v. Charfil Holding, Inc., 115 App. Div. 2d 472, 472, 495 N.Y.S.2d 903 (1985).

1990). Because of the questionable validity of additur in the federal courts and the particularly factual nature of damages in this case, the court feels conditional additur to be an inappropriate remedy to the low damages found at trial.

For the foregoing reasons, the court orders a new trial on damages.[3]

So Ordered.

Lee P. Gagliardi,
Senior U.S. District Judge

Dated: March 8, 1991
Fort Myers, Florida

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3. Although a surprisingly low verdict may sometimes indicate a compromise verdict, the court considers that liability was clear in this case and does not believe the low verdict resulted from compromise. Thus, it will not be necessary to retry the liability issues.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DIAMOND D ENTERPRISES U.S.A., INC.,

Plaintiff,

-against-

RICHARD STEINSVAAG and WEDDING SERVICES, INC.,

Defendants and
Counterclaim Plaintiffs,

-against-

DIAMOND D ENTERPRISES U.S.A., INC., RECEPTIONS PLUS, INC. and DAVID J. LESSER

Counterclaim Defendants.

REPORT AND RECOMMENDATION
ON PLAINTIFF'S APPLICATION FOR
ATTORNEY'S FEES

TO: THE HONORABLE LEE P. GAGLIARDI, SENIOR D.J. and THE HONORABLE VINCENT L. BRODERICK, D.J.

By Order, filed July 9, 1990, The Honorable Lee P. Gagliardi, D.J., in the absence of The Honorable Vincent L. Broderick, D.J., to whom this case is assigned, referred it to me for a Report

and Recommendation regarding plaintiff's application for attorney's fees.

BACKGROUND

This cause of action arose out of a Franchise Agreement, ("the Agreement"), entered into by plaintiff, Diamond D Enterprises USA, INc. ("Diamond D"), as "franchisor", and defendants, Wedding Services, Inc. ("Wedding Services"), and Richard Steinsvaag, as "franchisee". See Complaint, filed June 3, 1988, at Exhibit ("Exh.") 1. The Agreement required Diamond D to provide services and materials to Wedding Services, including the right to use the Diamond D trademark, limited within a specific area in Connecticut. In return Wedding Services, a company, all of whose outstanding stock is owned by its President, defendant, Richard Steinsvaag, ("Steinsvaag"),

undertook to perform a number of obligations or duties, if you will, which included periodic payments to Diamond D. The Complaint alleged a breach of certain of these duties by Wedding Services.

Diamond D alleged, inter alia, the failure of Wedding Services to pay royalties, advertising contributions, and to present an accurate accounting by the 15th of each month, pursuant to the terms of the Agreement. Plaintiff also alleged a continuing, post-termination, unauthorized use of the Diamond D trademark and promotional materials by defendants. See Id. at 11-33.

The relief sought in the Complaint includes damages for breach of the Agreement, a permanent injunction against the use of the trademark, the return of promotional materials, money damages, and

attorney fees; a preliminary injunction was sought by way of a separate motion, filed July 29, 1988.

The Answer, filed August 18, 1988, contains affirmative defenses and eight counterclaims. Three of the counterclaims involve common law business tort claims, such as tortious interference with business opportunities, misappropriation of funds and misrepresentation; two separate counts involve breach of contract; two counts were brought under the Connecticut Franchise Act, and one count under the Connecticut Unfair Trade Practices Act. Diamond D filed a Reply and Affirmative Defenses to Counterclaims on October 24, 1988.

Defendants unsuccessfully moved to amend their Answer to include four

antitrust counterclaims, which involve price fixing and illegal tying, as well as an additional breach of contract counterclaim. See Answer, Amended Affirmative Defenses and Amended Counterclaims, filed without leave of court on December 11, 1988. Probably recognizing their error, defendants later moved to amend their Answer, by Motion, filed December 20, 1989. The motion to amend was denied by Judge Broderick's Order, filed January 12, 1990.

A Jury trial, held on May 31 and June 1, 1990, resulted in a verdict for Diamond D, in the amount of $1300.00,[1]

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1. Diamond D moved to set aside the verdict and for conditional additur, or, in the alternative, for a new trial on the issue of damages. See Motion to Set Aside Verdict, etc., filed on June 5, 1990. The jury had offset the amount owed to plaintiff by $1200.00, the amount defendants claimed was overpayed [*sic*] for royalties and advertising payments. See Id. at 3.

on the breach of contract claim, which was the only claim submitted. See Defendants' Memorandum in Opposition To Plaintiff's Motion to Set Aside Verdict, etc., filed June 8, 1990 ("Memorandum in Opposition"), at 1. "The jury found damages for plaintiffs in the amount of $1300 . . . . [and] found against defendants on all counterclaims that had not already been dismissed." See Order of the Honorable Lee P. Gagliardi, D.J., filed March 15, 1991, at 2-3.

What is now before us for resolution is Diamond D's "Affidavit In Support of Application For Counsel Fees", filed June 5, 1990[2] and defendants' Memorandum in

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2. There is no separate Application for Counsel Fees. There is but an affidavit of Nicholas J. Damadeo, Esq., plaintiff's attorney, sworn June 4, 1990. In other words, the Application for Counsel Fees and the affidavit are one and the same.

Opposition, filed June 8, 1990.[3] Although the case was assigned to me for a factual report, it concerns a mixed question of law and fact, which has been raised by defendants, and which requires construction of the attorney fees provision, included in the aforementioned Agreement. The Agreement contains the following relevant and controlling provision:

> XXVII. COST OF ENFORCEMENT OR DEFENSE
>
> In the event Franchisor is required to employ legal counsel or to incur other expense to enforce any obligation of Franchisee hereunder, or to defend against any claim, demand, action, or proceeding by reason of Franchisee's failure to perform any obligation imposed upon Franchisee by this agreement and provided that legal action is filed by or against Franchisor and such action or the settlement thereof establishes

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3. In this connection, plaintiff's counsel also filed a Supplemental Affidavit on December 8, 1990, followed by Defendants' Response to Supplemental Affidavit, filed December 10, 1990.

> Franchisee's default hereunder, then Franchisor shall be entitled to recover from Franchisee for the amount of all reasonable attorney's fees of such counsel and all other expenses incurred in enforcing such obligation or in defending such claim, demand, action, or proceeding, whether incurred prior to or in preparation for or contemplation of the filing of such action or thereafter.

Defendants challenge the applicability of this provision to any attorney fees allocable to time spent either defending the counterclaims or seeking a preliminary injunction. See Memorandum in Opposition, at 3, 5. Defendants further attack the fee application due to Diamond D's failure to provide contemporaneous time sheets and to provide sufficiently detailed information from which the "reasonableness" of the application can be determined. Id., at 4.

In determining whether the attorney fees provision applies to the

counterclaims and proposed amended counterclaims and proposed amended counterclaims, we conduct a two-step analysis. As with the interpretation of any contractual provision, we begin with the express language. Under New York Law, contractual provisions for the payment of attorney fees are strictly construed. See F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1263 (2d Cir. 1987).

Considering the language of the subject provision, in light of its nature and purpose of fee-shifting within the framework of a franchise relationship, we conclude that it is unambiguous and clearly meant to apply only to actions that both arise out of the Agreement and ultimately establish the franchisee's default thereunder. Cf Mt. Everest Ski

Shops, Inc. v. Nordica USA, Inc., 736 F.Supp. 523, 528 (D.Vt. 1989). The additional language "or to defend against any claim, demand, action, or proceeding by reason of Franchisee's failure to perform any obligation imposed upon Franchisee by this agreement," does not apply to counterclaims against the franchisor, but to the defense of third party claims which arise as a result of the franchisee's failure to perform its duties. This express language, thus, establishes a requirement that the counterclaims be ex contractu, i.e., arise out of the Agreement and the duties created thereunder. Cf. LaFarge Conseils Et Etudes, S.A. v. Kaiser Cement, 791 F.2d 1334, 1340 (9th Cir. 1986). If a counterclaim were to arise out of substantive rights created by statute,

then no attorney fees would be awarded pursuant to the aforequoted attorney fees provision of this Agreement, unless the statute was used in a direct attack on the Agreement, i.e., to seek a declaration of nullity or a rescission of the Agreement. In such a case, the express language, "incurred in enforcing such obligation," would, naturally, include attorney fees incurred in defending against a direct attack on the viability or enforceability of the Agreement itself, regardless of the source of the rights the attack is grounded upon, provided, of course, that the action establishes a default of the franchisee.

Once it is established that a particular counterclaim is ex contractu, then we must determine the dominant

purpose for interposing the claim, in light of its nature and independent merit. This may require a balancing of the dual purpose generally attributed to a counterclaim: to "[1] diminish, defeat or otherwise affect a plaintiff's claim and [2] allow for recovery for defendant." Home Oil v. Todd, 195 Conn. 333, 341, 487 A.2d 1095, 1099 (1985) (quoting 1 Stephenson, Conn. Civ. Proc. (2d ed. 1982 Sup.) at §129(b)); see also 3 Weinstein, J., H. Korn & A. Miller, New York Civil Practice 3019.02 (Revised ed. 1990)).

Defendants' Counterclaims and Plaintiff's Opposition to Defendants' Motion to Amend

Defendants contend that the above-quoted contractual provision "clearly and explicitly excludes all fees and costs incurred in defending against the

Franchisee's Counterclaims." Memorandum in Opposition, at 3. In support, defendants rely on both the express language of the provision, which limits the scope of the attorney fees to actions brought "by reason of Franchisee's failure to perform any obligation imposed upon Franchisee by this agreement," and the fact that the cause of action for breach of contract was ultimately the only question presented to a jury. Defendants thereby reach the conclusion that Diamond D has no right to attorney fees for work defending the counterclaims. We disagree.

In their Answer, defendants interposed affirmative defenses and counterclaims, which allege, inter alia, fraud, misrepresentation, antecedent breach, breach of duties of good faith and fair

dealing, and misappropriation of funds. These claims are clearly ex contractu, in that they would not exist but for the agreement and promises to perform pursuant to its terms and conditions.

Moreover, the interposition of these counterclaims threatened the effective enforcement of the terms of the Agreement. These claims, including one under the Connecticut Unfair Trade Practices Act ("CUTPA"),[4] state, or incorporate by reference, various common law contract-related causes of action. Defendants' argument, denying application of the attorney fees provision to these

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4. Although CUTPA provides a statutory cause of action and is thus not ex contractu, per se, the claims arise out of the same transactions and are based on the same common law obligations alleged in the other counts of the complaint. CUTPA merely provides a statutory (punitive damages), rather than proscribing the underlying conduct. We, therefore, deem the attorney fees provision to apply to the CUTPA claims.

counterclaims must, therefore, be rejected.

These counterclaims, which seek damages allegedly resulting from a breach of duties on the part of the franchisor, would not likely have been interposed if the franchisor had not first sought to enforce its rights under the Agreement. As is the case with most counterclaims, these were brought primarily to "diminish, defeat or otherwise affect a plaintiff's claim and also allow for recovery for defendants." Home Oil v. Todd, supra, 195 Conn. at 341, 487 A.2d at 1099; Cf., Singer v. Shannon & Luchs Co., 670 F.Supp. 1024, 1028 (D.D.C. 1987).

Since the counterclaims, if successful, would undermine Diamond D's attempt to effectively enforce its rights

under the Agreement, the express language of the attorney fees provision applies to legal work performed relative to the counterclaims. See Odalia Oriental Rugs Gallery, Ltd. v. Seltzer, 1990 WL 58901 (S.D.N.Y.); Singer, supra, at 1028. Although it may be argued that all counterclaims serve, to some degree, the above cited purposes, we submit that those here asserted by defendants were aimed more toward accomplishing a defensive purpose or settlement strategy, rather than at providing a recovery to defendants, based on independent merit. We, therefore, find that Diamond D's attorney fees allocable to time spent with respect to defending counterclaims "One", "Two", "Three", "Four", "Five" and "Eight", are sufficiently related to the enforcement of its rights under the

Agreement and are, thus, subject to the attorney fees provision.

As to the antitrust counterclaims, which defendants sought to include in their proposed amended Answer, we have a different situation. We note, at the outset, that each of the proposed four antitrust counterclaims seek damages and that none of them seek a declaration that the Agreement was void for any reason, whether as anti-competitive or against public policy, or otherwise. Instead, they seek damages for improper conduct on the part of the franchisor that is independent of the alleged breach by defendants. Such impropriety on plaintiff's part is alleged to have taken place while the parties were acting under duties and authority created by the Agreement, but the duties allegedly

breached are those imposed by Federal and State Antitrust Statutes. "Neither claim is ex contractu; the duties arise by statute, not from the agreement of the parties." Mt. Everest Ski Shops, Inc., 736 F.Supp. at 529. These counterclaims do not arise out of the franchisee's breach of any duty under the Agreement, nor do they relate to its enforcement, directly or indirectly. Their primary purpose is to seek damages for the alleged illegal conduct of the franchisor. The only relationship these claims have to the Agreement, is the fact that the Agreement establishes the business relationship, under which the franchisor is alleged to have engaged in anticompetitive conduct. Since these claims are not ex contractu, we need not consider whether their purpose was

dominant over the secondary purpose of undermining plaintiff's attempts to enforce the terms of the Agreement. Defendants' objection as to applicability of the attorney fees provision is, therefore, sustained as to proposed anti-trust counterclaims, "One", "Two", "Three" and "Four". Since the motion to amend was denied and, hence these four counterclaims were never successfully interposed, our determination is intended merely to preclude the recovery of attorney fees allocable to time spent by Diamond D's attorney in opposing defendants' motion to amend its affirmative defenses[5] and counterclaims.[6]

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5. Defendant's proposed amendments to their affirmative defenses consisted merely of adding a waiver and estoppel defense. We do not allocate any portion of plaintiff's counsels' time to opposing such amendments, for it was, if anything, de minimus.

Thus, we disallow three hours of the December 1989 item, appearing in the Schedule attached to the original affidavit.

The counterclaims (Counts "Six" and "Seven"), alleging violation of the Connecticut Franchise Act's notice requirements for termination of a franchise and reimbursement, are also not ex contractu. The notice and reimbursement duties are created by statute not by the Agreement. Inasmuch, as the parties purported to expressly apply the law of the State of New York to

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6. The initial two counterclaims for breach of contract in the initial Answer were expanded into three counterclaims, but encompassing no new substantive claims. Thus, we do not discern that such unnecessary expansion required additional legal work for plaintiff's counsel over and above the time already required to oppose the addition of the antitrust counterclaims.

the Agreement,[7] and since the Agreement contains its own notification provisions (See Agreement, at 6, 4; Id. at 23-28), it cannot here be argued, that these Connecticut statutory provisions were incorporated into the Agreement and made a part thereof by the parties' joint intention or by operation of law. Thus, no attorney fees, allocable to time spent working on these claims, will be allowed.

Preliminary Injunction

Plaintiff also seeks attorney fees allocable to time spent seeking to provisionally enjoin, inter alia, the use by defendants of the Diamond D trademark

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7. Article XXX of the Agreement provides that "[t]his agreement was accepted in the state of New York and shall be governed by the laws thereof, which laws shall prevail, except to the extent governed by the United States Trademark Act of 1946 (Lanham Act, 15 U.S.C. Sections 1051 et seq.)."

and promotional materials. The language of the attorney fee provision does not clearly resolve the issue of its applicability to time spent seeking a preliminary injunction. Although the motion and hearing for a preliminary injunction arises out of an alleged failure of the franchisee to perform their obligations under the Agreement, it is not an action that "establishe[d] [the] franchisee's default" under the Agreement, as the language of the Agreement provides. More importantly, Diamond D did not prevail in pursuing this provisional remedy; it was held that there was no threat of immediate and irreparable harm. See Magistrate Barbara A. Lee's Report and Recommendation to Judge Broderick, filed March 16, 1989, at

23.[8] Had there been a threat of immediate harm, not capable of to be remedied by damages at law, the provisional remedy might be deemed so necessary as to be an integral part of the Franchisor's action to enforce the terms of the Agreement. Such was not found to have been the case here.

Furthermore, we do construe the final clause of Article XXVII, which purports to include in its scope "enforcing" or "defending" of "any claim, demand, action, or proceeding, whether incurred prior to or in preparation for or in contemplation of the filing of such action" to be applicable with respect to provisional remedies.

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8. The Magistrate's Report and Recommendation was adopted by Judge Broderick. See Order, filed October 12, 1989.

Calculation of Attorney Fees

Our Circuit, as well as the New York state courts, have adopted the "lodestar" analysis to determine a reasonable attorneys' fee, (see Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939 (1983)("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."); Friar v. Vanguard Holding Corp., 125 A.D.2d 444, 447 (2d Dept. 1986)(citing City of Detroit v. Grinnel Corp., 495 F.2d 448 (2d Cir. 1974)), and also have used this analysis when the fee application is made pursuant to a contract, as here. Zauderer v. Barcellona 130 Misc. 2d 234, 236 (Civil Ct., N.Y. Co., 1985). The lodestar "is the hours

reasonably spent on the case multiplied by a reasonable hourly rate for the attorney's time." Peter Fabrics, Inc. v. S.S. Hermes, 765 F.2d 306, 318 (2d Cir. 1983).

Diamond D's counsel claims that a total of 287.50 hours were expended on behalf of his client; that his hourly rate is charged at $200 and $160 for his associate's time, resulting in a total fee of $48,795. See Affidavit of Nicholas J. Damadeo, Esq., sworn June 4, 1990 in Support of Application for Counsel Fees, ("Counsel's original affidavit" or "original affidavit"). Defendants do not specifically take issue with the hourly rates,[9] but rather with

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9. In their Response to Supplemental Affidavit in Support of Plaintiff's Application for Counsel Fees, filed December 10, 1990, ("Supplemental Response"), defendants first raise the issue of whether the hourly rates claimed by

defendants' [*sic*] failure to provide contemporaneous time records and to set forth each item in sufficient detail. In light of our ruling with respect to the limited applicability of the Agreement's fee provision, these complaints have merit, since, in addition to general

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plaintiff's counsel for himself and associate are reasonable and customary hourly rates. "No biographical information or material relating to these attorneys is provided upon which the court may make a determination as to whether these are appropriate rates or not." See Supplemental Response, at 6. Inasmuch as we are not considering Plaintiff's Supplemental Affidavit for any purpose other than to confirm the authenticity of the summarized schedule already submitted, we will not entertain any new or further arguments from either party, except on the issue concerning the purported contemporaneous time records. However, parenthetically, at a $200 per hour rate for a partner and a $160 rate for a associate in this community it is deemed reasonable. We also note (see schedule attached to Supplemental Affidavit) that a good part, if not all, research and pre-trial preparation was performed by plaintiff's counsel's associate. Thus a charge of $160 per hour for the associate's time is not excessive, given the undoubted reality that such associate has considerable experience in research and trial preparation.

authenticity and reasonableness concerns, any deficiency in the evidence submitted by plaintiff translates into difficulty in applying our ruling with respect to limiting the matters to which the fee provision applies.

Accordingly, Diamond D's counsel was directed, by letter dated November 15, 1990, to submit, within ten (10) days, any available, contemporaneous time records in support of his client's fee application.[10] In the alternative, we

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10. Counsel requested and was granted an additional extension until November 30, 1990 to submit the time records. After completion of the first draft of this report and a time-consuming calculation of fees, we received, on December 4, 1990 (filed December 6, 1990), a supplemental affidavit and a schedule which purports to be a reproduction of computerized time records. We will not consider this late submission, except to the extent that it confirms plaintiff's counsel's original affidavit and our assumptions based thereon. There is no excuse for a failure to have produced this information initially. If, in fact, it represents <u>contemporaneous</u> computerized records, there is also no excuse for its late

requested an affidavit, detailing separately, the amount of time spent on the various matters listed in plaintiff's attached schedule under the heading "Description of Services" for August and October 1988 and January 1990. Upon receiving our letter, plaintiff's counsel sought an extension until November 30, 1990 but failed to respond as of the completion of the first draft of this report on December 2, 1990. On December 4, 1990, we received a Supplemental Affidavit In Support of Application for Counsel Fees, sworn to by plaintiff's

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submission even after the court's generously extended request, considering that the fee award could have been reduced substantially for failure to submit the contemporaneous time records and considering that defendant has not requested an evidentiary hearing. Obtaining a computer printout, without any additions, editions or afterthoughts, should have been an effortless task easily accomplished within the two weeks originally extended, despite the Thanksgiving Holiday.

counsel on December 3, 1990. Defendants' counsel responded to the aforementioned Supplemental Affidavit, however, we don't find it necessary to address the new arguments therein raised. Rather, we consider the Supplemental Affidavit only to the extent it confirms the information summarized in the original affidavit. We will not increase the award, as calculated from the information and assumptions initially made based on the original affidavit, in light of the additional work required of defendants' attorneys and the court, directly as a result of the deficiency of plaintiff's initial submissions in support of their fee application.

In plaintiff's counsel's original affidavit, certain claims, inapplicable to the Agreement's fee provision, are

included among those for which attorney fees should be awarded. In order to assess the attorney fees in a manner consistent with our interpretation of the contractual provision it was, of course, necessary to ascertain how much time was spent on each individual matter listed in the original affidavit and attached schedule. Unfortunately, the original affidavit and attached schedule, merely provides the following type of inadequate, confusing and non-particularized information, for example:

Month	Hours	Fee	Description of Services
Aug., 1988	12.00	1,920	Review pleadings and motion papers; telephone call with attorney; court appearance for conference on preliminary injunction; telephone calls

			with attorney for defendant; telephone calls with client;
	*	*	*
Oct., 1988	19.75	3,160	Review additional affidavits from defendants; prepare reply to counterclaim; meeting with client; review documents; prepare reply affidavit and exhibits;
	*	*	*
Jan., 1990	10.75	1,420	Research; letters to court; telephone calls with attorney, court and client; review document and exhibits;

The items listed for August and October 1988 contain, inter alia, mention of the counterclaims and the preliminary injunction, and as to other matters noted they are totally unspecific, preventing

proper attribution. As to the January 1990 items, we note one for "research", relative to an unidentified matter, which we will assume relates to plaintiff's opposition to the motion to amend the answer, affirmative defenses and counterclaims, which sought to add the four antitrust claims discussed above, filed January 8, 1990.[11] As aforementioned, these fees relating to plaintiff's opposition to the proposed amendments are disallowed, as are those reflected in the December 1989 entry, for the same reason. We will award fees for the six and three quarter hours reflected in the October and November 1989 entries.

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11. The schedule attached to the Supplemental Affidavit does not specify the matter for which the research was performed, however, it refers to a Memo of Law which is most likely the one filed on January 8, 1990, regarding the proposed amendments.

Except those involving discovery matters, fees claimed for work done from September 1988 through May 1989 are disallowed, since they primarily involve litigation of the preliminary injunction motion. Because we recognize the practical reality that a certain amount of time, in any litigation, must be spent communicating with the client, marshalling facts, discovery, and familiarizing oneself with the case, in general, we will allow attorney fees for a portion of the time spent at the outset, regardless of which matter was directly attended to. This is fair and reasonable because, once this time is spent initially, even with respect to the preliminary injunction motion, it need not be repeated for the remainder of the litigation. "The first step in the

resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." Upjohn Co. v. United States, 449 U.S. 383, 390, 101 S.Ct. 677, 683 (1981). Accordingly, we allow all of the time claimed for May and June of 1988, one-half of the time claimed for August of 1988, and forty hours claimed for December of 1988, which we find applicable to discovery.[12] In addition, we allow three hours for preparation of the Reply and Affirmative Defenses to Counterclaims, filed October 24, 1988. See above quotation from October 1988 of the schedule attached to

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12. It appears from plaintiff's original affidavit that most discovery matters were completed in December of 1988. This assumption is confirmed by the December 1988 entries in the computerized schedule attached to Plaintiff's Supplemental Affidavit.

the original affidavit.

The remaining 161.50 hours claimed, from October 1989 through June 1990, were clearly devoted to pretrial and trial matters and will be allowed, except for: (1) three hours for research and preparation of opposition to defendants' motion to amend Answer in December 1989; and (2) ten hours, relative to the Motion to Set Aside Verdict and for Conditional Additur, or in the Alternative, for a New Trial, filed June 5, 1990,[13] and this

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13. A new trial on damages was granted by the Honorable Lee P. Gagliardi, Senior U.S.D.J. See Order, filed March 15, 1991. Although the motion was successful and might be deemed applicable to the contractual attorney's fee provision, the Order post dates the attorney fee application and we decline to address the question at this time. Presumably, plaintiff will supplement its attorney's fee application if and when a new damages trial is held.

application for attorney fees.[14] Thus, the hours applicable to the Agreement's fee provision total one-hundred and ninety-nine (199).

The above quoted schedule (attached to the original affidavit) also fails to specify whether work was performed by an associate or partner. Prior to October 1989, it appears, mathematically, that the billing was, for the most part, at the rate of $160 per hour.[15] With

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14. Under New York law, "'[a]ttorney's fees incurred in proceedings to collect attorney's fees are not recoverable.'" F.H. Krear & Co. v. Nineteen Named Trustees, supra, 810 F.2d at 1266 (2d Cir. 1987)(quoting Zauderer v. Barcellona, supra, 130 Misc. 2d 234, 495 N.Y.S.2d at 883; also Swiss Credit Bank v. International Bank, Ltd., 23 Misc.2d 572, 573-574, 200 N.Y.S.2d 828, 830-831 (Sup. Ct. 1960)("'A general agreement for the payment of counsel fees does not generally include counsel fees in the suit to collect those fees.'" (citation omitted)).

15. This assumption was also confirmed by the schedule attached to plaintiff's Supplemental Affidavit.

respect to the period May-June 1990, substantially devoted to trial-preparation and the trial, the hourly rate averages at $192.95 ($16,980/88). See schedule attached to the original affidavit, at 3. In the absence of an explanation in the original affidavit, of the specific work performed by the partner and by the associate, we are applying the above hourly rate of $192.95 for the allowable hours during the period May-June 1990.

Contemporaneous Time Records

Defendants raise, in their Memorandum in Opposition, at 4-5, Diamond D's failure to submit contemporaneous time records as justification for a complete denial of attorney fees. However, we direct plaintiff's counsel, in our letter of November 15, 1990, to submit detailed

contemporaneous time records. Failure to maintain such records may result in a reduction of attorney's fees actually assessed or awarded. See F,H, Krear & Co., supra, 810 F.2d at 1265; Lewis v. Coughlin, 801 F.2d 570, 577 (2d Cir. 1986); New York Ass'n for Retarded Child. v. Carey, 711 F.2d 1136, 1148 (2d Cir. 1983)(contemporaneous time records is a mandatory requirement for all "court ordered" attorney fees applications); Hensley v. Eckerhart, supra, 461 U.S. at 433, 103 S.Ct. at 1939 (contemporaneous time records preferred). Once the lodestar has been computed, the court may adjust the fee award upward or downward taking into account other factors. Friar v. Vanguard Holding Corp., supra, 125 A.D.2d at 447. That authority will not be employed here, for there is no basis

for its application.

We again remind counsel of the importance of contemporaneous time records and further note that in this case, a substantial reduction in the award would have been warranted absent the further submissions requested by the court and most belatedly submitted by Diamond D. We acknowledge that the Supplemental Affidavit and purported computer printout appear consistent with the original affidavit, as well as confirming the assumptions we were forced to make due to the deficiencies of the original affidavit and attached schedule.

The mandatory rule announced by Carey, and restated in Lewis, applies to all "court-ordered" attorney fee awards. The difficult and time consuming duties placed upon a district court, faced with

the prospect of resolving disputes over reasonable attorneys' fees, is compounded by the failure of counsel to carefully keep and submit detailed contemporaneous records. "[O]ur task in assessing the [defendants'] objections has been complicated by plaintiff's failure to maintain contemporaneous records." Carey, 711 F.2d at 1147. Thus, the Carey court expressly noted "the difficulties that can be traced to the failure of plaintiffs' attorneys to keep contemporaneous time records." Id. It is no less difficult for a court to calculate attorney fees based on a contractual provision, as here, than on statutory fee shifting provisions applied in certain cases. Thus the policy reasons underlying the mandatory rule are equally applicable to the task of

calculating fees pursuant to a contractual fee provision. An overall reduction in fees is a justified and permitted penalty and well within the court's discretion. It offers a simple compromise between the limited probative value of the original affidavit and schedule attached thereto, submitted by plaintiff, defendants' concern over a possible overstatement of attorney fees and right to a hearing, and the required submission of contemporaneous records. Plaintiff's belated submission of its Supplemental Affidavit and attached computerized schedule, we deem sufficient to meet the contemporaneous time sheet requirement and, accordingly, we recommend no imposition, by way of penalty, of a substantial reduction in the total fees recommended to be allowed.

RECOMMENDATION

In light of all of the above, we recommend that plaintiff, Diamond D Enterprises USA, Inc., be awarded and recover from defendants, Richard Steinsvaag and Wedding Services, Inc., jointly and severally, as and for plaintiff's attorney fees, the total sum of $34,288.00. This sum is predicated upon the total hours we deem applicable to the contractual attorney fees provision. See our computations attached hereto as Exhibit "A".

NOTICE

Pursuant to 28 U.S.C. §636(b)(1)(C), as amended, and Rule 72(b), Fed. R. Civ. P., the parties shall have ten (10) days, plus an additional three (3) days, pursuant to Rule 6(e), Fed. R. Civ. P., or a total of thirteen (13) working days,

(see Rule 6(a), Fed. R. Civ. P.), from the date hereof, to file written objections to this Report and Recommendation. Such objections, if any, shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable District Court Judges Lee P. Gagliardi and Vincent L. Broderick, at the United States Courthouse, 101 East Post Road, White Plains, New York, 10601, and to the chambers of the undersigned, at the said Courthouse.

A party who may feel aggrieved by a recommendation decision herein and who fails to file timely objections thereto, waives any right to appellate review of the District Court's order (or judgment) entered relative hereto. See Thomas v. Arn, 474 U.S. 140 (1985); Wesolek v.

Canadair, Ltd., 838 F.2d 55, 58 (2d Cir. 1988). Requests for extensions to file objections shall be made to the Judge and shall not be made with the Magistrate.

DATED: White Plains, New York
April 15, 1991.

RESPECTFULLY SUBMITTED,

Joel Tyler,
U.S. Magistrate

CALCULATION OF FEE AWARD

EXHIBIT "A"

DATE	RATE	HRS. CLAIMED	HRS. ALLOWED	AWARD*
May, 1988	$200 (250/1.25)**	1.25	1.25	$250.00
June, 1988	$200 (50/.25)	.25	.25	$50.00
Aug. 1988	$160 (1920/12)	12.00	6.00	$960.00
Sept. 1988	DISALLOWED	9.75	-0-	-0-
Oct. 1988	$160	19.75	3.00	$480.00

Nov. 1988	DISALLOWED	11.75	-0-	-0-
Dec. 1988	$160 (8800/55)	55.00	40.00	$6400.00
Jan. 1989	DISALLOWED	1.50	-0-	-0-
Feb. 1989	DISALLOWED	1.25	-0-	-0-
Mar. 1989	DISALLOWED	4.25	-0-	-0-
Apr. 1989	DISALLOWED	8.50	-0-	-0-
May 1989	DISALLOWED	.75	-0-	-0-
Oct. 1989	$ 80 (80/1.00)	1.00	1.00	$80.00
Nov. 1989	$160 (920/5.75)	5.75	5.75	$920.00
Dec. 1989	$152.31 (495/3.25)	3.25	.25	$38.00
Jan. 1990	$132.09 (1420/10.75)	10.75	10.75	$1420.00
Feb. 1990	$164.76 (6920/42)	42.00	42.00	$6920.00
Mar. 1990	$160 (120/.75)	.75	.75	$120.00

Apr. 1990	$160 (1600/10)	10.00	10.00	$1600.00
May-June 1990	$192.95 (16,980/88)	88.00	78.00	$15,050.00
TOTALS		287.50	199.00	$34,288.00

* Rounded to nearest quarter.

** The schedule attached to plaintiff's original affidavit fails to advise of the hourly rate that applies for each attorney in arriving at the total fee for each monthly period. Accordingly, it devolved upon this court the necessary task (a responsibility that should have been undertaken by plaintiff) to compute an average hourly rate for each period listed on that schedule. We did so by dividing the total fee charged by the claimed time spent during each period stated on the schedule.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DIAMOND D ENTERPRISES U.S.A., INC.,

Plaintiff,

-against-

RICHARD STEINSVAAG and WEDDING SERVICES, INC.,

Defendants and
Counterclaim Plaintiffs,

-against-

DIAMOND D ENTERPRISES U.S.A., INC., RECEPTIONS PLUS, INC. and DAVID J. LESSER,

Counterclaim Defendants.

MEMORANDUM AND ORDER
ON ATTORNEY'S FEES AFTER SECOND TRIAL

Brieant, Chief Judge

In this long lasting litigation arising out of a breach of contract under a franchise agreement, we are required to fix the reasonable legal fees and expenses to be awarded to the attorney for the plaintiff franchisor, as required

by Article XXVII of the Franchise Agreement. Much of the legal fees have been fixed and awarded by Magistrate Tyler. Remaining for consideration are the time charges for the successful motion for a new trial on the issue of damages, and the fees in connection with that new trial. The sum of $1,600.00 is requested (eight hours at $200.00 per hour) for the motion. This appears appropriate.

Plaintiff also claims $9,180.00 for 38.05 hours for the retrial at $240.00 per hour, and $340.00 for the paralegal.

The Court has examined the itemized time charges. Items 9, 10, 11, 19, 22 and 24 are disallowed as unreasonable or unnecessary and item 15 is reduced to 1 hour. This leaves 24.25 hours of services which in a matter of this

magnitude should be adequately compensated at $200.00 per hour for a total of $4,850.00, and an award of $5,090.00 for the retrial.

In this case, in which the legal fees being shifted far outweigh the recovery, it was unnecessary to "oppose" the discharge by the defendants of their attorney. Similarly, choice of a lawyer residing or having his office almost two hours away from the place of trial, while permissible, ought not to be visited on the adversary.

Total fees in addition to those allowed by Magistrate Tyler are awarded at $6,690.00. The Court sees no need for prejudgment interest on the legal fees. None is provided for in Article XXVII of the Franchise. It should have been obvious to the draftsman of this contract

of adhesion, that no fees could be recovered until the action was resolved on the merits. If prejudgment interest on the legal fees were intended, it would have been mentioned in the agreement.

A final judgment has been signed.

SO ORDERED

Dated: September 27, 1991
White Plains, New York

Charles L. Brieant, Chief Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DIAMOND D ENTERPRISES U.S.A., INC.,

Plaintiff,

-against-

RICHARD STEINSVAAG and WEDDING SERVICES, INC.,

Defendants and Counterclaim Plaintiffs,

-against-

DIAMOND D ENTERPRISES U.S.A., INC., RECEPTIONS PLUS, INC. and DAVID J. LESSER,

Counterclaim Defendants.

JUDGMENT

This action having come on for trial before the Court and a jury, Honorable Lee P. Gagliardi, District Judge, presiding, and the issues having been duly tried, and the jury having duly rendered its verdict, and the verdict having been set aside as inadequate and a

new trial on damages only having been ordered by Honorable Lee P. Gagliardi, District Judge, and this action having come on for trial of the issue of damages only before the Court and a jury, Honorable Charles L. Brieant, Chief Judge, presiding, and the issues having been duly tried, and the jury having duly rendered its verdict, and the Court, by Order of Honorable Lee P. Gagliardi dated September 14, 1991, having directed that plaintiff be awarded as part of its judgment the sum of $34,288.00 for attorney's fees, and the Court, by Order of Honorable Charles L. Brieant, dated September 27, 1991, having directed that plaintiff be awarded as part of its judgment the sum of $6,690.00 for additional attorney's fees it is

ORDERED AND ADJUDGED that the

plaintiff DIAMOND D ENTERPRISES U.S.A., INC., having its offices at 1970 Jerome Avenue, Bronx, New York 10453, recover of the defendants RICHARD STEINSVAAG and WEDDING SERVICES, INC., respectively residing and having its offices at 83 Sherman Turnpike, W. Redding, Connecticut 06875, in the amount of $17,109.00, with interest at 9% from January 1, 1989 amounting to $4,217.00, plus attorney's fees in the amount of $40,978.00, plus costs and disbursements of this action in the amount of $1,048.00, amounting in all to $63,352.00, and it is further

ORDERED AND ADJUDGED that the counterclaims be dismissed on the merits.

Dated: White Plains, New York
September 27, 1991

Charles L. Brieant, Chief U.S.D.J.

PUBLISHER'S NOTE:

PAGE NUMBER(S) 80a COULD NOT BE LOCATED.

as required by Article XXVII of the Franchise Agreement. We do so in accordance with an order of the Court of Appeals dated November 18, 1992. The legal fees to be awarded are limited to the defense of the appeal to the Court of Appeals for the Second Circuit, which resulted in an affirmance of prior orders of Judge Gagliardi and the final judgment of this Court after the second trial.

The familiarity of the reader with all prior proceedings in this case, is assumed. The Court has considered the motion for additional fees, docketed in this Court on December 9, 1992, but held in abeyance awaiting actual receipt of the mandate of the Court of Appeals (not docketed in this district court until December 30, 1992), as well as papers submitted by defendants in opposition.

The fees on appeal are requested in the amount of $15,000.00. In addition, plaintiff's attorney seeks an additional $960.00 for making the motion for fees. This latter portion of the claim is not compensable under the fee shifting clause as this Court has previously held in this very litigation.

The defense of the appeal was entirely successful. The appeal was argued August 10, 1992, and resulted in a published opinion of the Court of Appeals issued October 21, 1992, and reported at 979 F.2d 14 (2d Cir. 1992).

The only legal issues presented and decided on the appeal were (1) whether Judge Gagliardi committed error or abused his judicial discretion by granting a motion for a new trial on damages only, upon his finding that, "a reasonable jury

applying the Court's instructions could [not] find damages in such a low amount", which far from novel issue was resolved in favor of the Appellee; and (2) whether prior awards of attorneys fees made by Magistrate Tyler and the undersigned were unauthorized. This latter issue was slightly more complex, but here again, appellee was completely successful.

The Court concludes that the claimed hourly charges for attorney Damadeo of $240.00 per hour; $160.00 per hour for his associates; and $80.00 per hour for paralegals were reasonable during 1992 when this appeal was litigated. However, hourly rates of that magnitude assume the work will be done efficiently, that the lawyer making the charge has full access to CALR, and that legal research necessary for the trial of the case will

be preserved and reused in drafting the brief on appeal, rather than being done over again. In connection with services in prior years in this litigation, this Court found that an award for Mr. Damadeo at only $200.00 per hour would be reasonable. We do understand however, that the hourly fees of lawyers have been marching onward and upward due to inexorable economic pressures, and the Court does not regard itself as bound by its prior findings on the issue of the hourly rate appropriate for these services, performed later in time.

Our bean counting operation is now addressed to the unnumbered pages following page 4 of the Damadeo affidavit, attached to Document 104, filed November 27, 1992. The Court makes adjustments as follows: May 8, 1992--

time of JH reduced from 1.50 to .50; and May 11, 1992 -- time of JH reduced from 2.00 to .50. This work could have been accomplished by mail, did not require a trip to White Plains, and should not have required an hour and a half on the telephone. June 4, 1992 and June 10, 1992 -- research claimed at 11.00 is reduced to 7.00. The amount claimed is regarded as unreasonable and excessive. A lawyer should have been able to accomplish all necessary research within 7 hours. Most issues had already been briefed in the trial court, and if the prior research was not used, it should have been. June 15, 1992 through June 17, 1992 -- preparation of brief was charged at a total of 48 hours of lawyers' time. The Court believes that an attorney should have been able to

organize and write the appellate brief in this case, check it for errors, and proofread it with approximately one full day's work. This item is treated as if performed by Mr. Damadeo himself, and allowed at 10 hours of his time. The entry of October 26, 1992 through November 3, 1992 for receiving and reviewing the decision of the Court of Appeals, is disallowed as unnecessary insofar as concerns the defendant. The entry of November 3, 1992 for 2.00 hours is disallowed. We have previously noted that the preparation of the motions for attorneys fees is not compensable as part of the fee shifting under the contract. This item is part of the $15,000.00 time charges claim, and is in addition to the additional claim of $960.00 for the instant motion in this Court.

Recognizing that a lawyer's work should not be judged by time alone, but by all criteria comprised within the concept of quantum meruit including, in this situation, a clearly successful outcome, the Court hereby fixes the reasonable fee to be paid by defendants in the amount of $7,500.00. This represents solely the amount of reasonable charges, in fairness, which should be imposed on the defendants in this fee shifting situation. It is not to be regarded as a finding that the amounts actually charged to the client were so unreasonable as to be unethical, nor does the Court suggest that such charges could not be made and collected on a retainer agreement with a client, based on hours actually expended, even if, by hindsight the work could have been

accomplished in far fewer hours.

A supplemental judgment on remand shall be filed with the Clerk, awarding additional fees in the total amount of $7,500.00 to the plaintiff Diamond D Enterprises, U.S.A., Inc., against defendants Richard Steinsvaag and Wedding Services, Inc., jointly and severally.

SO ORDERED.

Dated: White Plains, New York
December 31, 1992

CHARLES L. BRIEANT,
CHIEF JUDGE